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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[redacted]5

JAMES BRYSON MARTIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Supreme Court of the United States

No. ....., October Term, 1964

James Bryson Martin,

Petitioner,

v.

The State of Texas,

Respondent.

The Clerk will enter our appearance as
Counsel for the Petitioner

.....

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No. .....

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OCTOBER TERM, 1964

JAMES BRYSON MARTIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

JAMES BRYSON MARTIN, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, rendered in the above entitled cause on January 6, 1965. Petitioner's First Motion for Rehearing was overruled on February 17, 1965.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas in the above entitled cause are as yet unreported, but copies of the said opinions are attached hereto as Appendix B.

JURISDICTION

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(3). The opinions of the Court of Criminal Appeals of Texas in this cause are in conflict with the Constitution and Laws of the United States and the holdings of this Honorable Court interpreting said Constitution and Laws.

The judgment in this cause became final on February 17, 1965 upon the entry of the judgment overruling the Motion for Rehearing. With the overruling of said Motion, Petitioner exhausted his State remedies. (Appendix C).

Vernon's Annotated Texas Constitution, Art. 5, § 1 and § 5, provide as follows:

Article 5, § 1

> "Section 1. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Court, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

Article 5, § 5

> "Section 5. The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

The Legislature of the State of Texas, acting pursuant to the aforesaid state constitutional mandate provided for appeals in criminal cases by the enactment of the Code of Criminal Procedure of Texas, Art. 53 to-wit:

> "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

The Court of Criminal Appeals of Texas is the highest appellate Court in Texas in criminal cases. *Pointer* v. *Texas*, ... U.S. ....., 13 L ed 2d 923, 925.

The Motion for Stay of Mandate, pending timely presentation of this Petition for Writ of Certiorari to this Honorable Court, and the Order staying the mandate and all other proceedings to permit the Petitioner to seek a Writ of Certiorari from this Honorable Court, was granted by the Court of Criminal Appeals of Texas on February 18, 1965. Appendix C.

QUESTIONS PRESENTED

FIRST QUESTION

Have the Petitioner's rights under the substantive provisions of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States been violated where a state conviction was had upon evidence obtained pursuant to a state statute providing for a "Court of Inquiry" which authorizes the issuance of civil process enabling the State to gather evidence to be used in a subsequent criminal proceeding prior to the institution of formal criminal charges, said "Court of Inquiry" having been conducted in the following manner:

a) The Defendant was compelled by civil process to be in attendance as a witness and was deprived of the right against self-incrimination.

b) As a witness, Defendant was deprived of the right of counsel, right of confrontation and right of cross-examination.

c) By virtue of a *subpoena duces tecum* issued and executed while Defendant was in custody, Defendant was compelled to produce books, records and other evidence which was discovered by said process, retained by State authorities and utilized to convict Defendant?

SECOND QUESTION

Have the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States been violated by a state statute which provides for a "Court of Inquiry" as described in Question One which is utilized as an extra-judicial means of investigation of crime and marshalling of evidence and where the knowledge gained as a result thereof is used to convict Defendant?

THIRD QUESTION

Does the Constitution of the United States permit a State to secure a conviction in a case in which after it has come to the attention of the State that the Grand Jury does not have sufficient information upon which to return an indictment, the State recesses the Grand Jury and proceeds with a "Court of Inquiry" as described in the First and Second Questions which is conducted as a public inquisition at which one or more members of the Grand Jury are in attendance and evidence obtained as a result of said "Court of Inquiry" is used to secure an indictment, is subsequently used in the trial on the merits and upon which a conviction is secured against the Defendant?

FOURTH QUESTION

Is a *subpoena duces tecum* which was utilized as a search and arrest warrant which was issued without probable cause, did not contain an affidavit, and evidence gained as a result thereof was used to obtain a conviction in a state criminal proceeding, unconstitutional and void as not complying with the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Rules Three and Four of the Federal Rules of Criminal Procedure?

FIFTH QUESTION

Has there been a violation of Petitioner's Constitutional rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where a state district court judge, in whose district jurisdiction and venue was originally laid, summarily and without a plenary, evidentiary hearing and over Defendant's objection transferred the venue to a foreign district where the instant conviction was secured?

Do the Sixth and Fourteenth Amendments to the Constitution of the United States provide that a state criminal trial must take place in the district where the offense occurred?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are Art. 3, § 2, Cl. 3 and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Art. 1, § 10 and Art. 3, § 45 of the Constitution of Texas. The statutory provisions involved herein are Arts. 560, 886 and 887, Vernon's Annotated Code of Criminal Procedure of Texas and Rules 3 and 4, Federal Rules of Criminal Procedure. Because of their length, the text of all of the foregoing provisions are set forth in Appendix A.

STATEMENT OF THE NATURE OF THE CASE

I. Procedural History of the Case

The Petitioner, an attorney, was jointly charged with four others by indictment with the offense of bribery. The indictment was returned by a Grand Jury of Harris County, Texas and the case was set for trial in the Criminal District Court Number Five of Harris County, Texas.

The Petitioner filed a Motion to Quash the Indictment in the Criminal District Court Number Five of Harris County, Texas. A hearing was had on the Motion and it was denied. After the denial of the aforesaid Motion, which was in the nature of a Motion to Suppress Evidence, the trial court, on its own motion, and over Defendant's objection, without any evidentiary hearing, changed the venue from Harris County, Texas to Brazos County, Texas under color of Art. 560, Vernon's Annotated Code of Criminal Procedure of Texas where the Petitioner was, after another objection to venue, subsequently tried and convicted and sentenced to four years in the state penitentiary and a fine of Twenty-Five Hundred Dollars. A certified copy of said hearing is on file with the Clerk as required by Rule 23 (1) (f).

Petitioner appealed the conviction to the Court of Criminal Appeals of Texas in Cause Number 37,037. The Court of Criminal Appeals affirmed the conviction on January 6, 1965; this affirmance was followed by Petitioner's Motion for Rehearing which was overruled on February 17, 1965. On February 18, 1965 the Court of Criminal Appeals of Texas stayed the execution of the mandate from said court to allow Petitioner an opportunity to prosecute his Petition for Writ of Certiorari to this Honorable Court. See Appendix C.

II. Facts Material to the Questions Presented

Prior to being indicted, but after state authorities had focused their suspicions of guilt upon him (Statement of Facts pp. 34-36 on Motion to Quash the Indictment), Petitioner, under general subpoena as a witness, was required, under threat of imprisonment for contempt and by virtue of a *subpoena duces tecum* issued as a part of the infamous "Court of Inquiry" held by Justice of the Peace W. C. Ragan

and District Attorney Frank Briscoe, investigating the so-called "probate scandal" of Harris County, Texas, to produce for the inspection of and retention by the said District Attorney Briscoe, a great volume of Petitioner's books and records. (S.F. pp. 30-33, 43; 69-71 and 146 on Motion to Quash Indictment)

These personal and business records were obtained through the execution of said *subpoena duces tecum* by state authorities including an investigator in the District Attorney's office, a Deputy Sheriff and an Assistant District Attorney, who accompanied the Petitioner, while under arrest, (S.F. p. 146 on Motion to Quash the Indictment) to his office, home, and bank in their search for and collection of evidence. In the aforesaid "Court of Inquiry", "a witness had the alternative of testifying or being held in contempt of court and imprisoned until he answered the questions under oath as Arts. 886 and 887 of the Code of Criminal Procedure of Texas require." (S.F. p. 43 on Motion to Quash the Indictment). All witnesses in said Court of Inquiry, which included Petitioner, were denied the right to be represented by counsel; were denied the right to offer any evidence in mitigation, extenuation or defense; were denied the right to cross-examine witnesses and all other Constitutional safeguards. (S.F. pp. 34-37 and 85-88 on Motion to Quash the Indictment). Any attorney who attempted to intervene in behalf of any client-witness-suspect was summarily ridiculed, threatened and coerced and the District Attorney of Harris County, Texas often stated in open court that the Court of Inquiry allowed no participants other than those who were called by the District Attorney and no one could interrogate witnesses except the State of Texas and there was to be no cross-examination or confrontation of witnesses. (S.F. 85-88 Motion to Quash the Indictment).

The district court in Harris County, Texas and the trial court (trial on the merits) in Brazos County, Texas both overruled all attempts by Petitioner to quash the indictment which was based to a great extent on the evidence obtained as aforesaid and refused to supress said evidence and declare it inadmissible. (S.F. p. 217 on Motion to Quash the Indictment and p. 150 on trial).

As stated above, the district court in Harris County, Texas, after hearing Petitioner's pre-trial motion and overruling same, (Motion to Quash the Indictment), took it upon himself to change the venue of the case to another county under authority of Art. 560, Vernon's Annotated Code of Criminal Procedure of Texas (S.F. pp. 218-222 on Motion to Quash the Indictment). No evidence was ever adduced to support the aforesaid change of venue and the record clearly reflects that in fact, the court changed the venue because the publicity given the Court of Inquiry proceedings was unfavorable to the Petitioner, with no mention of impartiality concerning the State of Texas, which is clearly required by Art. 560, where no motion for change is requested by the state or the defendant.

Brazos County, Texas is located relatively close to Harris County, Texas and receives television, radio and newspaper coverage from and substantially identical to that in Harris County, and was permeated by the news media with publicity concerning the "Court of Inquiry" proceedings to the same extent as Harris County. Therefore the same prejudices as a result of publicity that existed in Harris County, existed likewise in Brazos County and the change of venue to Brazos County was improper.

The Court of Criminal Appeals of Texas, as reflected by its opinions, incorporated herein as Appendix B, failed to recognize every error alleged and shown by the Petitioner.

III. Federal Questions Raised in the Trial Court and the Court of Criminal Appeals of Texas

A. In the Trial Court

Prior to the trial on the merits below, Petitioner filed his Motion to Quash the Indictment which was also in the nature of a Motion to Suppress Evidence.

The district court in Harris County, Texas overruled the motion over Petitioner's objection and further on its own motion, the Harris County court transferred the venue of the case from Harris County, Texas to Brazos County, Texas, over Petitioner's objection. The trial court in Brazos County reaffirmed all actions of the Harris County court, over proper objection.

B. In the Court of Criminal Appeals of Texas

The Court of Criminal Appeals of Texas on January 6, 1965 in an opinion delivered by Judge Dice, which opinion was approved by the Court held:

> "Complaint is made to the court's refusal to quash the indictment. Appellant timely filed and presented to the court a motion to quash the indictment, in which he alleged numerous reasons why the indictment failed to charge an offense. In the motion, appellant further excepted to the indictment on the ground that it was returned by a grand jury which had before it evidence that had been illegally obtained in a court of inquiry held before Justice of the Peace W. C. Ragan, of Precinct No. One of Harris County, in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States."
>
> • • • •
>
> "Appellant's attack upon the indictment on the ground that it was returned upon evidence illegally obtained in a court of inquiry is similar to that urged

and overruled in *McClelland* v. *State,* 373 S.W. 2d 674, where it was held that such was not a ground for quashing an indictment in this state."

On the issue of the change of venue on the Harris County court's own motion the Court of Criminal Appeals held:

> "Complaint is also made to the court's action in ordering venue changed to Brazos County. Appellant does not present by either formal or informal bill of exception any facts which refute the court's finding that a fair and impartial trial to both appellant and the state could not be had in Harris County. In the absence of such proof it will be presumed, on appeal, that the court had a basis for such finding, and no error is shown. *Ross* v. *State,* 220 S.W. 2d 137."

The Court of Criminal Appeals of Texas specifically ruled on Petitioner's contention that the trial court erred in allowing, over proper objection, the introduction of the evidence obtained as the result of the subpoena issued as a part of the Court of Inquiry, holding:

> "We overrule appellant's contention that the court erred in allowing the state to introduce evidence which was unconstitutionally obtained, in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. An examination of the record does not reflect that any illegally obtained evidence was introduced against appellant. The evidence presented against him consisted of the testimony of witnesses and numerous exhibits of bank records which were presented in court under subpoenas issued by the district clerk of Brazos County. No evidence which appellant insists was illegally obtained in the court of inquiry was introduced upon the trial."

In its Opinion on Appellant's Motion for Rehearing, the Court of Criminal Appeals of Texas dealt at some length

with Petitioner's contention that the evidence introduced over his objection at the trial was inadmissible as "fruits of the poisonous tree". The Court, through the Honorable Judge W. A. Morrison, stated:

> "In a scholarly manner appellant has attacked our original opinion because we failed to discuss his contention that all evidence as to the Tierra Grande books were introduced over his objection that they were tainted under the 'fruits of the poisonous tree' doctrine so ably announced years ago by the Supreme Court of the United States in *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 64 L. ed. 319, 40 S. Ct. 182. His contention is bottomed upon the assertion that the subpoena duces tecum issued by the Court of Inquiry which made it possible for the prosecution to secure possession of copies of such records was an illegal process because the Court of Inquiry itself was conducted in an unconstitutional manner."
>
> "The answer to this contention seems to be that both our Civil Courts and this Court have had this question before them and have failed to agree with him."
>
> "While it is true that this writer on Motion for Rehearing in *McClelland* v. *State,* 373 S.W. 2d 674, expressed his trepidation over the propriety of the manner in which the Court of Inquiry was conducted, and Chief Justice Bell and Justice Coleman expressed their concern over the same matter in *McClelland* v. *Briscoe,* 359 S.W. 2d 635, no court has held that such procedure reaches constitutional dimensions."
>
> "*Silverthorne, supra,* was a case of search without a warrant and by virtue of an invalid subpoena. Here we have a subpoena duces tecum (itself a process authorized by statute) issued by the Justice of the Peace who was acting pursuant to his authority after having convened the Court of Inquiry which was authorized by Article 886, V.A.C.C.P., a statute of this State which was first enacted by the Legislature in 1876."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. This Honorable Court should grant certiorari herein so that it may discuss the substantive provisions of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and it may effectively explain to the State of Texas its precise holdings in *Boyd* v. *United States,* 116 U.S. 616; *Malloy* v. *Hogan,* 378 U.S. 1, and all of this Court's recent decisions dealing with the interrelationship of the Fourth, Fifth, Sixth and Fourteenth Amendments since the Court of Criminal Appeals of Texas has been unable to apply the Federal standard to the great detriment of Petitioner and to the detriment of all those who have been and are continuing to be subjected to the Court of Inquiry procedure.

This Honorable Court has, in early and in recent terms expressed its views regarding the rights of the individual suspected of crime to be free from unreasonable searches and seizures; to be free from being a witness against himself; to have the effective assistance of counsel; and to have the right of confrontation and cross-examination, all guaranteed by the Constitution of the United States. *Boyd* v. *United States, supra; Silverthorne Lumber Company* v. *United States, supra; Malloy* v. *Hogan, supra; Pointer* v. *Texas, supra; Wilson* v. *United States,* 148 U.S. 60; *Murphy* v. *Waterfront Commission,* 378 U.S. 52; *Counselman* v. *Hitchcock,* 142 U.S. 547; *Hoffman* v. *United States,* 341 U.S. 479; *Aguilar* v. *Texas,* 378 U.S. 108; *Gideon* v. *Wainwright,* 372 U.S. 335; *Massiah* v. *United States,* 377 U.S. 152; and *Escobedo* v. *Illinois,* 378 U.S. 418.

The "Court of Inquiry", is a creature of statute to-wit: Arts. 886 and 887, V.A.C.C.P. The procedure in the instant case was nearly identical in substance with that condemned

by this Honorable Court in the time honored cases of *Boyd* v. *United States, supra* and *Silverthorne Lumber Company* v. *United States, supra,* as well as the recent cases of *Malloy* v. *Hogan, supra,* and *Pointer* v. *Texas, supra.*

The Court of Criminal Appeals of Texas has, with the affirmance of this cause, authorized the executive branch of the State of Texas to conduct investigations under power of process and sanctions of contempt and in which all suspect witnesses subpoenaed have no right to counsel, no right of confrontation, no right of cross-examination of other suspect-witnesses and are not free from unreasonable searches and seizures as a result of subpoenas issued out of the said investigation, even when, as in Petitioner's case, the witness is, in fact, highly suspected of crime, though he may not have been formally charged by complaint. The executive officer of the State of Texas who conducted the Court of Inquiry in question, to-wit: the Honorable Frank Briscoe, District Attorney of Harris County, Texas, stated in his Article, *Texas 'Courts of Inquiry' — A Legitimate Means of Criminal Investigation* published in the *Houston Law Review,* Vol. I, No. 2.

> "Despite protests that this article strips a witness of his rights against self-incrimination, such is not the fact, and certainly not the law. *There is a clear distinction between the privilege of an accused, and one who is merely a witness.* Again, under Texas Law, an accused, or defendant, is one who, in a legal manner, is held to answer for an offense, or against whom complaint in a lawful manner is made, charging an offense, from the order for arrest to the final execution of the law. Clearly, the privilege of an accused is limited to one against whom a punitive criminal proceeding has been specifically directed, as by an indictment or information. Since a court of inquiry is an investigation and not in and of itself, in any manner, a criminal prosecu-

tion, the privileges reserved — for his protection — for one accused of a crime need not, nor should not, be extended to witnesses in an investigatory proceeding. (emphasis added)"

• • • •

"Effective administration of the criminal law and the maintenance of public order requires effective methods for the discovery, investigation, and deterrence of crime. (emphasis added)"

• • • •

"A recent, highly-publicized use of the Texas statutes began on June 5, 1962. On that date the district attorney of Harris County filed with a local justice of the peace a petition for a court of inquiry into the administration of the probate court of Harris County, setting out that he had good cause to believe that offenses had been committed against the laws of the state and praying that various witnesses be summoned and examined. The justice of the peace granted the petition and ordered the hearing set to begin June 14, 1962. The justice ordered various witnesses summoned, including the then probate judge of the county. (and Petitioner)"

• • • •

"On the following day, June 14, 1962, the court of inquiry began. In four days of testimony, seventeen witnesses were called. Only the district attorney was permitted to examine the witnesses. Some of the witnesses objected to testifying, but only one refused to do so. He was held in contempt, jailed and testified fully the next day. Attorneys representing some of the witnesses attempted to examine their clients on the witness stand, or to "cross-examine" some of the other witnesses."

• • • •

"Subsequent to the court of inquiry, the probate court judge and eight individuals were indicted for various felony offenses including conversion of estates, perjury, and bribery.

• • • •

"In this same vein, the rather free and unadvised use of the words 'right' or 'constitutional rights' in our modern legal parlance is to be deplored. 'Rights' are being asserted where none exist — nor the need for any — except, as it were, on behalf of those charged or about to be charged with the commission of a crime. In the instant matter, declamations were asserted repeatedly that the witnesses at the court of inquiry had a 'right' to the calling of witnesses, the 'right' of cross-examination, and the 'right' of confrontation of witnesses, as well as the 'right' to have these alleged offenses investigated in the 'secrecy of the grand jury.' It can be readily seen that the first three alleged 'rights' traditionally have been reserved for *defendants who are on trial, in a lawful manner being held to answer for an offense charged against him.* The fourth alleged 'right' does not exist. A suspect simply should not be permitted to direct the manner of the investigation against him." (emphasis added)

The Court of Criminal Appeals of Texas in affirming this cause has further held that one, suspected of crime, may be forced under subpoena and the sanctions of contempt therefrom, to produce under subpoena to the executive branch of the State, incriminating business and private records, as indicated by Defendant's exhibits (Defendant's Motion to Quash the Indictment). The subpoenas in fact were used as search warrants and of course did not comply with any of the requirements of the Fourth and Fourteenth Amendments to the Constitution of the United States as enunciated by this Honorable Court in *Aguilar* v. *Texas, supra; Barnes* v. *Texas,* ..... U.S. ....., 13 L ed 2d 818; *Mapp* v. *Ohio,* 367 U.S. 643; *Ker* v. *California,* 374 U.S. 23; and *Giordenello* v. *United States,* 357 U.S. 480. The Court of Criminal Appeals engaged in specious reasoning when it held in its opinion herein, that all that was required to make the aforesaid unconstitutionally obtained evidence

admissible was for the clerk of the trial court to issue subpoenas for its production at the trial.

It is respectfully suggested that this Honorable Court should here and now, grant Certiorari herein and reverse and remand this cause so that the Court of Criminal Appeals of Texas will fully understand that where a question of constitutional dimension is concerned, it must strike down a state statute and may not hide behind the following shield:

> "The writer has perused with care the record made before the Honorable Sam Davis on Appellant's motion to quash the indictment, made a part of the record in this case, and is of the same opinion as he expressed in *McClelland* v. *State, supra,* and here now expresses the thought that the Legislature should provide needed relief by either eliminating the statute which authorizes the Court of Inquiry or providing some procedural safeguards for the conduct of proceedings before the same. But we have not been able to bring ourselves to hold that the conduct before us here is comparable with that denounced in *Silverthorne, supra.*"

Ninety-five years elapsed between 1791, when the Fourth Amendment was adopted and 1886 when this Honorable Court first had occasion to give it significant interpretation in *Boyd* v. *United States, supra,* ". . . the leading case on the subject of search and seizure . . ." *Carroll* v. *United States,* 267 U.S. 132, 147. This dearth of litigation on the subject is largely due to the fact that it was not until 1878 that Congressional Legislation *permitted* a Defendant to testify in his own behalf in criminal cases (20 Stat. 30; Act of March 16, 1878 c. 37). In *Boyd,* a proceeding for the forfeiture of a quantity of glass alleged to have been imported without the payment of tariff duties, the Government moved to compel the witness to produce the invoices covering the purchase of the goods pursuant to an Act of Con-

gress which provided that such documents, if not produced were to be assumed to contain matters alleged by the prosecution. That Honorable Court unanimously sustained the Defendant's contention that the statutory procedure offended the Fifth Amendment by compelling the Defendant to produce self-incriminating evidence. Seven of the Justices went further, however, holding that the Congressional Act also authorized an unreasonable search and seizure contrary to the terms of the Fourth Amendment. It is noted that the search and seizure in *Boyd* was wholly constructive as there was no actual intrusion upon the Defendant's property or physical seizing of papers. Nevertheless, that Court regarded it as an unconstitutional invasion of the Defendant's privacy since it was an attempt by the Government to obtain information to be used solely for the purpose of establishing proof of the commission of the offense. See also *One 1958 Plymouth Sedan* v. *Pennsylvania*, ... U.S. ....., 33 L.W. 4387.

In *Silverthorne Lumber Company* v. *United States, supra,* this Court had before it another case strikingly similar to the instant one. In *Silverthorne,* the defendants were arrested and taken into custody. While they were being detained, Government agents, without a search warrant, went to defendant's business office and confiscated all of the books, papers and documents there. Upon defendant's Motion to Suppress and for return of the papers, the trial court found that they had been unconstitutionally seized, whereupon the Government agents returned the papers to the defendants but only after they had made copies of all of the material documents. A new indictment was then framed, based on the knowledge thus obtained and subpoenas were served upon the defendants specifying in great detail, all documents sought (all of the detailed information was obtained in the illegal search). The defendants were convicted of contempt for failure to respond to the sub-

poenas. This Honorable Court reversed the conviction in an opinion delivered by Justice Holmes:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them;"

In discussing the procedure used by the government in *Silverthorne* this Honorable Court stated that to allow such a procedure,

> ". . . reduces the 4th Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

This Honorable Court in *Wong Sun and James Wah Toy* v. *United States,* 371 U.S. 471 (1963), reaffirms *Silverthorne, supra.* The Court in *Wong Sun, supra* held that petitioner Toy's declarations immediately subsequent to his unlawful arrest had to be excluded as "fruits" of the unlawful arrest and that exclusion required also the exclusion of the narcotics obtained by the arresting officers from a third party upon the information obtained from Petitioner Toy. The Court held that the test for exclusion is:

> "whether granting establishment of the primary illegality, the evidence to which instant objection is made

> has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

There can be no question therefore that evidence is inadmissible under the exclusionary rule, including the federal standard, not only when obtained as the *yield* of an illegal search, but also if it results from *information derived from* an illegal search. *Woo Lai Chun* v. *United States,* 274 F. 2d 708 (9th Cir. 1960); *United States* v. *Krulewitch,* 167 F. 2d 943 (2d Cir.); *People* v. *Martin,* 382 Ill. 192, 46 N.E. 2d 997 (1942); *Simmons* v. *State,* 277 P. 2d 196 (Okla. 1954).

The sworn testimony of Frank Briscoe, the District Attorney of Harris County, Texas, who represented the State of Texas from the time that the Court of Inquiry was born, through the trial in the instant case, and in the Court of Criminal Appeals of Texas, shows that prior to the birth of the Court of Inquiry, there was little, if any, information regarding the matters upon which the indictments in the "Probate Scandal" were founded and that initially, the State of Texas did acquire a great deal of evidence through the Court of Inquiry and that the Court of Inquiry was used as an investigative procedure to determine whether or not a criminal offense had been committed. (S.F. 69-71)

In *Malloy* v. *Hogan, supra,* the facts were very similar to the instant case. In *Malloy,* the petitioner was arrested and later plead guilty to a misdemeanor gambling charge and was sentenced to a term in jail and a fine, which sentence was suspended after 90 days, the petitioner being placed on probation for two years. Sixteen months after the guilty plea, the petitioner was ordered to testify before a referee conducting an inquiry into alleged gambling and other criminal activities in the State of Connecticut. He refused to

answer all questions and was adjudged in contempt and committed to prison wherein he eventually effected his appeal to this Court which granted certiorari and reversed, holding:

> ". . . that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's priviledge against self-incrimination, in that *under the applicable federal standard,* the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked." 378 U.S. ....., 12 L. Ed. 2d at 656. (emphasis added)
>
> • • • •
>
> "We turn to the petitioner's claim that the State of Connecticut denied him the protection of his federal privilege. It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries. Counselman v. Hitchcock, 142 U.S. 547, 35 L ed 1110, 12 S Ct 195; McCarthy v. Arndstein, 266 US 34, 69 L ed 158, 45 S Ct 16; Hoffman v. United States, 341 US 479, 95 L ed 1118, 71 S Ct 814. We recently elaborated the content of the federal standard in Hoffman:
>
> > "'The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . .'" 378 U.S. ....., 12 L ed 2d at 661.

In *Malloy* this Honorable Court further stated:

> "The shift reflects recognition that the American system of criminal prosecution is *accusatorial, not inquisitorial,* and that the Fifth Amendment privilege is its essential mainstay. *Rogers* v. *Richmond,* 365 US 534, 541 5 L ed 2d 760, 766, 81 S Ct 735. Governments, state and federal, are thus constitutionally compelled to

> establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (emphasis added) 378 U.S. ....., 12 L ed 2d at 659.

This Honorable Court in *Griffin* v. *California,* No. 202, October term, 1964, ... U.S. ....., 33 L.W. 4382, has recently reaffirmed *Malloy* holding:

> "We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." ..... U.S. ....., 33 L.W. at 4383.

In the very recent decision in *Pointer* v. *Texas, supra,* this Court once more reaffirmed *Malloy,* stating:

> "We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against self-incrimination, is to be enforced against the States under the Fourteenth Amendment *according to the same standards that protect those personal rights against federal encroachment.* (emphasis added.) *Malloy* v. *Hogan, supra,* 378 U.S. ....., 13 L ed 2d at 928."

Petitioner respectfully suggests that certiorari should be granted herein for the reason that the executive branch of the State of Texas has made such widespread use of the Court of Inquiry procedure not only in the Court of Inquiry in the instant case in which eight individuals were indicted but also in other investigations. In prosecutions growing out of the instant Court of Inquiry, in addition to Petitioner's cause, there will shortly be before this Honorable Court petitions for certiorari in two cases in which the

former probate judge of Harris County, Texas, Clem McClelland is the petitioner. In addition to these two individuals, several persons, indicted as a result of the Court of Inquiry, but not yet brought to trial, are intimately involved in this matter. As is reflected by the case of *Ex-Parte N. A. Smith,* 383 S.W. 2d 401 the inquisitorial procedure allowed by Arts. 886 and 887, *supra,* was again used in Harris County, Texas in a completely separate investigation and many indictments were returned as a result of said inquisition.

It is respectfully suggested that the decision by this Honorable Court as to the constitutionality of Arts. 886 and 887, *supra,* as utilized, should now be decided by this Honorable Court to effect the proper administration of criminal justice in the State of Texas.

The Petitioner herein was deprived of counsel and his rights secured pursuant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States when he was compelled to testify at the Court of Inquiry without the benefit of counsel even though his counsel was present in the room at said time. The magistrate would not allow any witness to confer with counsel for the reason that the witness had not been charged by formal complaint.

This Honorable Court discussed a similar situation in *Escobedo* v. *Illinois, supra.* In *Escobedo,* counsel was present in the Police Station but not present in the homicide office wherein Escobedo was being interrogated. In the instant case counsel was physically present, but was unable to assist Petitioner or confer with him due to the arbitrary and unusual rules controlling the Court of Inquiry. This Petitioner contends, that this Honorable Court in discussing the Fifth and Sixth Amendments in *Massiah,* and *Escobedo* required more than mere physical presence of counsel to satisfy the aforesaid constitutional requirements.

This Petitioner was placed in a more serious situation than either *Massiah* or *Escobedo*. In *Massiah* the Government agent was unknown and in *Escobedo* he was given the right to make an election as to whether he would sign a confession or refuse to sign said document. Here the Petitioner was compelled to be present in Court; to be sworn; to answer the questions without conferring with counsel or to pay the penalty of going to jail. This was a trial by the news media and the magistrate. The damage to a professional person has already resulted when his peers witness the sheriff locking him in jail for refusal to obey the magistrate's order to testify.

The instant procedure can be most accurately described as being very similar to the Soviet system as described by Justice Goldberg in *Escobedo* v. *Illinois, supra.*

> "The Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as 'an appeal from the pre trial investigation'."

The observation of Justice Black in the case of *In re Groban,* 352 U.S. 330, at 344, is particularly illustrative of the instant procedure.

> "The right to use counsel at the formal trial, is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

II. Certiorari should be granted herein because an important question affecting the personal rights of the individual under Art. 3, § 2, Cl. 3 and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States is involved.

Petitioner herein was denied, in his state trial, the protections guaranteed to all individuals by the Fifth, Sixth

and Fourteenth Amendments to the Constitution of the United States, since the district court of Harris County, Texas, wherein the crime is alleged to have occurred and wherein the indictment was returned, took it upon itself to change the venue of the case to another county under color of authority of Art. 560, V.A.C.C.P. which allows such a transfer where, in the Court's opinion, neither the state nor the defendant can obtain a fair and impartial trial in the county wherein venue originally lies. Petitioner seriously urges unto this Honorable Court, as he did at every opportunity in the state courts of Texas, that a procedure such as utilized in the instant case, is a gross violation of the right to a speedy and public trial by jury in the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as well as Art. 3, § 2, Cl. 3, thereof.

Justice Clark wrote in *United States* v. *Cores*, 356 U.S. 405, that the purpose of the Constitutional mandate referred to above was to safeguard against a prosecution against a defendant in a remote spot with all of the attendant prejudices against the defendant. Such were the facts in the instant case wherein a transfer was made to Brazos County, Texas, some 100 miles from Harris County, Texas providing a foundation for the State's case without the Defendant's good name being known in Brazos County as it was in Harris County due to his civic and philanthropic endeavors in his own district.

This Honorable Court held in *United States* v. *Johnson*, 323 U.S. 273:

> "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "the

> Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." Article 3, § 2, Cl. 1. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial by an impartial jury of the State and district wherein the crime shall have been committed. Sixth Amendment."

The Texas Constitution, Art. 3, §45, states that the trial court can change the venue in a civil or criminal case in accordance with the law. It cannot be denied that the United States Constitution is indeed law and the mandate presented therein guarantees to an accused the right to be tried in the locale of the alleged crime. While Art. 3, §45, *supra,* further states that the Legislature of Texas may enact laws providing for such changes of venue, as it did with Art. 560, *supra,* it is submitted that the United States Constitution, Amendments Six and Fourteen, are the framework within which these guiding laws must be placed. Thus, provisions for waiving the right to be tried in the vicinage of the alleged crime could be enacted, but to allow the State to utilize a procedure whereby the accused may be whisked away to be tried on unfamiliar ground, over his objection and without hearing, denies to the accused the due process guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

This Honorable Court has, in recent decisions, held various portions of the Sixth Amendment to be included within the rights guaranteed to the individual citizens of the states in state prosecutions, either directly or indirectly. *Gideon* v. *Wainwright, supra; Massiah* v. *United States, supra; Escobedo* v. *Illinois, supra; Pointer* v. *Texas, supra.* Petitioner respectfully suggests that this cause provides an excellent opportunity for this Honorable Court to discuss the application of the venue portion of the Sixth Amend-

ment to the states since, had this been a Federal prosecution, the action of the Harris County district court would be held to be void, invalid and unconstitutional, without question. There now being a Federal Standard governing the conduct of criminal proceedings, this state procedure should be held unconstitutional. *Griffin* v. *California, supra.*

In *Pointer* v. *Texas, supra,* this Court, dealing with the question of confrontation and cross-examination as applicable to the states by virtue of the Sixth and Fourteenth Amendments, stated:

> "We are aware that some cases, particularly *West* v. *Louisiana,* 194 US 258, 264, 48 L ed 965, 970, 24 S Ct 650, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. See also *Stein* v. *New York,* 346 US 156, 195-196, 97 L ed 1522, 1548, 73 S Ct 1077. But of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And as this Court said in *Malloy* v. *Hogan, supra,* 'This Court has not hesitated to reexamine past decisions according to the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme.' 378 US, at 5, 12 L ed 2d at 657. In the light of *Gideon, Malloy,* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in West and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. ..... U.S. ....., 13 L ed 2d at 927, 928."

This Court further stated in *Pointer* that at least as to the guarantees of confrontation and self incrimination the

Sixth Amendment is to be applied and enforced against the states through the Fourteenth Amendment using the same standards which apply in federal cases, citing *Malloy*. With the opinion in *Pointer*, as it must be construed with *Ker, Aguilar, Gideon, Escobedo* and *Malloy*, this Honorable Court should grant Certiorari herein to discuss the application of the venue portion of the Sixth Amendment to the states through the Fourteenth Amendment, since without question, it is a fundamental right (Art. 3, §2, Cl. 3) and the federal standard requires a reversal herein for the error of the Harris County District Court in arbitrarily changing venue as has been stated above.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the Court of Criminal Appeals of Texas for action consistent with the opinions of this Court so that there will not be a curtailment of Petitioner's Constitutional guarantees under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

.....
Clyde W. Woody

.....
Marian S. Rosen

Attorneys for Petitioner

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Houston, Texas 77002
CA 2-9225

CERTIFICATE OF SERVICE

I, Clyde W. Woody, attorney for Petitioner herein, hereby certify that on the ..... day of May, A.D. 1965, I served a copy of the foregoing Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas upon the Honorable Waggoner Carr, Attorney General of Texas, at the Capitol Building, Austin, Texas, by depositing an envelope containing such copy in the United States Mail with first class postage affixed thereto, return receipt requested and addressed to his aforesaid address.

.....

Clyde W. Woody

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. 3, § 2, cl. 3
Section 2. Criminal Trial by Jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [XIV.]

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF TEXAS

Art. 1, § 10. Rights of accused in criminal prosecutions

SEC. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the

State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. Added Nov. 5, 1918.

Art. 3, § 45. Change of venue in civil and criminal cases

SEC. 45. The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing

therein or by mailing it to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

Art. 560. [626] [613] On court's own motion

Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue. Acts 1876, p. 274; Const. art. 5, sec. 45.[1]

---

[1] Reference to Constitution, art. 5, § 45, should probably have been to Constitution art. 3, § 45.

Art. 886. 976, 941 Court of inquiry

When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint had been made and filed.

Art. 887. 977, 942. Witnesses refusing to testify

Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement.

APPENDIX B

No. 37,037

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM BRAZOS COUNTY

OPINION

The conviction is for bribery; the punishment, four years in the penitentiary and a fine of $2,500.

Appellant, James Bryson Martin, and Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren were jointly charged by indictment with the offense of bribery of one Clem McClelland, a probate judge of Harris County.

Motions for severance were filed in Criminal District Court No. 5 of Harris County, in which court the indictment was pending, by appellant and also by his four codefendants. The codefendants' motion was by the court granted and, the defendants being unable to agree upon the order of trial, appellant was ordered to be tried first.

After granting the severance, the court on his own motion ordered venue of the cause changed to Brazos County and trial in the 85th Judicial District Court of said county. In the order changing venue, the court found that a trial alike fair and impartial to the accused and the state could not be had in Harris County because of the existence in the county of such great prejudice against appellant.

This is an appeal from appellant's trial and conviction in Brazos County.

The indictment, omitting the formal parts, charged:

> ". . . that on or about the 2nd day of December, A.D. 1960, in said County and State, Clem McClelland was then and there the Judge of the Probate Court of Harris County, Texas, a judicial officer, the said Clem McClelland having been duly elected and qualified as such officer and having entered upon the duties of said office, a part of said duties being the appointment of appraisers, administrators and guardians in matters, causes, and proceedings filed in the Probate Court; and ROSS EVAHN, DAVID HUDSON, E. R. COFFEY, R. M. DUREN, and JAMES BRYSON MARTIN did then and there unlawfully, wilfully, and corruptly bribe and offer to bribe the said Clem McClelland by giving him the sum of Twenty-Five Thousand Seven Hundred Eighty-Three Dollars and Ten Cents ($25,783.10) in money with the intent to influence the acts, decisions, judgments and recommendations of the said Clem McClelland in his judicial capacity to thereafter appoint them, the said ROSS EVAHN, DAVID HUDSON, E. R. COFFEY, R. M. DUREN, and JAMES BRYSON MARTIN as appraisers, administrators, and guardians in matters, causes, and proceedings then pending before the said Clem McClelland in his judicial capacity, and in matters, causes, and proceedings which would thereafter be brought before and come before the said Clem McClelland in his judicial capacity in violation of his duty as said officer."

The state's evidence shows that on the dates in question, Clem McClelland was the duly elected and acting probate judge of Harris County.

As probate judge, it was Judge McClelland's duty to appoint administrators, guardians, and appraisers in cases filed in his court. During the period from January 1, 1961, through May, 1962, Judge McClelland appointed the appellant and his codefendants, Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren, as appraisers in estates for a total of 3511 times. In this same period he appointed 257

other persons as appraisers in estates for a total of 2225 times. It was shown that until January 1, 1962, the appraisers in each estate received a fee of $5, which was charged as court costs, but that additional appraisal fees were paid the appellant and his codefendants in certain estates. In one estate, appellant and two of his coindictees received the sum of $1,200; in another estate appellant, together with one of his coindictees and another person, received $300; and in a third estate appellant received a fee of $50.

On December 2, 1960, the appellant and two other persons obtained articles of incorporation from the secretary of state, authorizing the corporation to do business under the name of Tierra Grande, Inc. The appellant, acting as president of the corporation, on December 2, 1960, opened a bank account in the name of Tierra Grande, Inc., in the Citizens State Bank of Houston. The only two persons authorized to make withdrawals from the account were the appellant and Helen Smith, who had been Judge McClelland's secretary for a number of years. Beginning in December, 1960, and in each succeeding month through May, 1962, the appellant and his four coindictees made numerous deposits into the Tierra Grande, Inc. account. During such period, Evahn's deposits totaled $6,775; Hudson's totaled $4,750; Coffey's totaled $3,666.10; Duren's totaled $7,975; and those of the appellant were in the total sum of $558. During this same period of time numerous checks were drawn on the Tierra Grande account which were either payable to Judge McClelland or, from the notations thereon, were shown to be for his benefit. The total amount of checks payable to Judge McClelland or to cash and endorsed by him was in the sum of $10,550. Many other checks in various amounts were shown to have been issued for the judge's benefit. Some of the checks drawn on the Tierra Grande, Inc.

account and payable to Judge McClelland had been endorsed by him and deposited to his personal account in another bank.

Appellant did not testify or call any witnesses in his behalf.

In submitting the issue of appellant's guilt to the jury, the court charged upon the law of principals and circumstantial evidence.

We find the evidence sufficient to support the judgment of conviction.

The record is before us without any formal bills of exception.

Complaint is made to the court's refusal to quash the indictment. Appellant timely filed and presented to the court a motion to quash the indictment, in which he alleged numerous reasons why the indictment failed to charge an offense. In the motion, appellant further excepted to the indictment on the ground that it was returned by a grand jury which had before it evidence that had been illegally obtained in a court of inquiry held before Justice of the Peace W. C. Ragan, of Precinct No. One of Harris County, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The record contains the motion to quash the indictment, together with the court's order thereon and a statement of facts of the evidence adduced in connection therewith. The court's order does not show an exception by appellant to the court's ruling, as required by Art. 760e, V.V.C.C.P., to constitute an informal bill of exception under such article. Brooks v. State, 342 S.W. 2d 439.

We have, however, examined the indictment in the light of appellant's exceptions and find that it follows the statute,

and the allegations are sufficient to charge the offense of bribery, under Art. 158, V.A.P.C.

Appellant's attack upon the indictment on the ground that it was returned upon evidence illegally obtained in a court of inquiry is similar to that urged and overruled in McClelland v. State, 373 S.W. 2d 674, where it was held that such was not a ground for quashing an indictment in this state.

Complaint is made to the court's action in denying appellant's motion for severance and in granting his codefendants' motion and ordering him tried first. In his motion, appellant alleged that Judge Clem McClelland was under indictment for an offense growing out of the same transaction, and requested that he be tried first. Request was further made that following Judge McClelland's trial, appellant's coindictees, Evahn, Hudson, Coffey, and Duren, be put to trial in the order named.

We find no error in the court's action. The record shows that the court, in fact, granted a severance on motion of appellant's coindictees, Evahn, Hudson, Coffey, and Duren. It further appears that appellant and his four coindictees were unable to agree upon the order of trial. Upon their failure to agree, it was the duty of the court, under Art. 652, V.A.C.C.P., to direct the order of trial. In ordering appellant tried first, the court did not err. Henderson v. State, 192 S.W. 2d 446.

Complaint is also made to the court's action in ordering venue changed to Brazos County. Appellant does not present by either formal or informal bill of exception any facts which refute the court's finding that a fair and impartial trial to both appellant and the state could not be had in Harris County. In the absence of such proof it will be presumed, on appeal, that the court had a basis

for such finding, and no error is shown. Ross v. State, 220 S.W. 2d 137.

Complaint is made to the court's action in permitting the state's witness, Deputy County Clerk Weldon H. Kretschmar to testify from a list which had been prepared by him and others under his direction, showing all the appraisers appointed by Judge McClelland during the period from December 1, 1960, through May, 1962. Complaint is also made to the court's action in admitting the list in evidence, as state's exhibit #43, over appellant's objection that it was in violation of the best-evidence rule.

The witness Kretschmar, as deputy county clerk of Harris County, was shown to be custodian of the probate records. He testified that the list was prepared from the records by him and those under his direction, and verified the accuracy of the list and stated that it was prepared from the original records, which consisted of between sixteen and seventeen thousand pages and contained between five and six thousand guardianships.

The original probate records were in court at the trial and made available to appellant for inspection. Under the record, the court did not err in admitting the list in evidence and in permitting the witness to testify from the list, which was a summation made by the witness from the original records of the appointments made by Judge McClelland during the period of time shown. New Amsterdam Casualty Company v. W. D. Felder & Co., 214 Fed. 2d 825, 5 Cir.; Spradlin v. Rosebud Feed & Grain Co., 294 S.W. 2d 301, Civ. App., writ refused.

We overrule appellant's contention that the court erred in allowing the state to introduce evidence which was unconstitutionally obtained, in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to

the Constitution of the United States. An examination of the record does not reflect that any illegally obtained evidence was introduced against appellant. The evidence presented against him consisted of the testimony of witnesses and numerous exhibits of bank records which were presented in court under subpoenas issued by the district clerk of Brazos County. No evidence which appellant insists was illegally obtained in the court of inquiry was introduced upon the trial.

We also overrule appellant's contention that the penalty provision of Art. 158, *supra,* is so vague and indefinite as to render the statute void.

The penalty provision of the statute provides:

> ". . . shall be confined in the penitentiary not less than two nor more than five years, or be confined in jail for not less than one month nor more than two years, or be fined not less than Five Hundred Dollars nor more than Five Thousand Dollars, or by both such fine and imprisonment."

In Mosier v. State, 234 S.W. 225, a similar penalty provision in Art. 1150, V.A.P.C., defining the offense of failure to stop and render aid, was upheld against a contention that it was vague and indefinite.

The judgment is affirmed.

DICE, Judge

(Delivered January 6, 1965)
Opinion approved by the court.

No. 37,037

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM BRAZOS COUNTY

OPINION

ON APPELLANT'S MOTION FOR REHEARING

In a scholarly manner appellant has attacked our original opinion because we failed to discuss his contention that all evidence as to the Tierra Grande books were introduced over his objection that they were tainted under the "fruits of the poisonous tree" doctrine so ably announced years ago by the Supreme Court of the United States in Silverthorne Lumber Company v. United States, 251 U.S. 385, 64 L. ed. 319, 40 S. Ct. 182. His contention is bottomed upon the assertion that the subpoena duces tecum issued by the Court of Inquiry which made it possible for the prosecution to secure possession of copies of such records was an illegal process because the Court of Inquiry itself was conducted in an unconstitutional manner.

The answer to this contention seems to be that both our Civil Courts and this Court have had this question before them and have failed to agree with him.

While it is true that this writer on Motion for Rehearing in McClelland v. State, 373 S.W. 2d 674, expressed his trepidation over the propriety of the manner in which the Court of Inquiry was conducted, and Chief Justice Bell and Justice Coleman expressed their concern over the same matter in McClelland v. Briscoe, 359 S.W. 2d 635, no court has held that such procedure reaches constitutional dimensions.

Silverthorne, *supra,* was a case of search without a warrant and by virtue of an invalid subpoena. Here we have a subpoena duces tecum (itself a process authorized by statute) issued by the Justice of the Peace who was acting pursuant to his authority after having convened the Court of Inquiry which was authorized by Article 886, V.A.C.C.P., a statute of this State which was first enacted by the Legislature in 1876.

It is not within the province of an appellate court to declare unconstitutional all that appears to them to be unfair and not wise exercise of the powers of government. In the case of Sproles v. Binford, 286 U.S. 374, 76 L. ed. 1167, 52 S. Ct. 581, the Supreme Court of the United States said:

> "When the subject lies within the police power of the State, debatable questions as to the reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

The writer has perused with care the record made before the Honorable Sam Davis on Appellant's motion to quash the indictment, made a part of the record in this case, and is of the same opinion as he expressed in McClelland v. State, *supra,* and here now expresses the thought that the Legislature should provide needed relief by either eliminating the statute which authorizes the Court of Inquiry or providing some procedural safeguards for the conduct of proceedings before the same. But we have not been able to bring ourselves to hold that the conduct before us here is comparable with that denounced in Silverthorne, *supra.*

Appellant's contention as to the failure of the court to place McClelland on trial first is without merit because the court was without the power to direct the order of trial in

in McClelland's case, as he had already transferred the case against McClelland to another county and could not prevent a continuance in appellant's case by then ordering McClelland's case first. Henderson v. State, 283 S.W. 497.

The appellant's motion for rehearing is overruled.

Morrison, Judge

(Delivered February 17, 1965)

APPENDIX C

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,037 styled:

JAMES BRYSON MARTIN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

judgment of the 85th Judicial District Court of Brazos County, Texas, was affirmed on January 6, 1965, Appellant's Motion for Rehearing overruled, February 17, 1965, and order staying mandate and all other proceedings, to permit appellant to apply to the Supreme Court of the United States for a Writ of Certiorari, was issued and filed February 18, 1965.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on February 17, 1965, appellant having exhausted all remedies in this, the Court of Criminal Appeals of Texas, and the Court of Last Resort of Texas in criminal cases; and said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas this 8th day of April, A.D. 1965.

/s/ Glenn Haynes
Glenn Haynes,
Clerk, Court of Criminal Appeals
of Texas

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NO. 345

IN THE

Supreme Court of the United States

October Term 1964

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

J. EDWIN SMITH
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NO._____

IN THE

Supreme Court of the United States

October Term 1964

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Clem McClelland, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in the above entitled cause.

OPINIONS OF THE COURT BELOW

The Opinion and judgment of the Court of Criminal Appeals of Texas in the above entitled cause is reported as *McClelland v. State of Texas*, 389 S.W.2d 678; a copy is attached as Appendix "A" (Pages 25 to 33). The Opinion

in a companion case, reference to which is necessary to ascertain the grounds of the judgment, is reported as *McClelland v. State of Texas,* 373 S.W.2d 674. Copy of this Opinion is attached as Appendix "B" (Pages 34 to 63).

The judgment of the trial court which was affirmed by the Court of Criminal Appeals is attached as Appendix "C" (Pages 64 to 65).

GROUNDS OF JURISDICTION

The judgment and decree sought to be reviewed was handed down and entered by the Texas Court of Criminal Appeals on January 6, 1965. First and Second Motions for Rehearing were timely filed and were finally overruled on April 21, 1965, on which date the judgment became final. The mandate issued on May 21, 1965. These facts are confirmed by certificate of the Clerk of the Court of Criminal Appeals, attached as Appendix "D" (Page 66).

Jurisdiction of the Supreme Court of the United States of America is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

The trial court refused to take evidence on Petitioner's Motion to Quash the Indictment, in which Motion Petitioner asserted deprivation of rights guaranteed to him by Amendments V, VI and XIV to the Constitution of the United States; he alleged that as a part of the grand jury proceedings the prosecuting attorney prior to indictment purposefully and intentionally instituted and conducted a televised public examination of the grand jury witnesses, and the Petitioner; that in these proceedings Petitioner, though bearing the status of an accused, was expressly denied the right to defend, the right to be represented by his retained

counsel, the right to cross-examine, the right of confrontation, the right of compulsory process, and the right to contradict and to rebut; that such proceedings were contrary to the traditions inherent in grand jury proceedings and guarantee of indictment by a grand jury; that such procedures had never before been used by the State in a felony prosecution; and that the proceedings were conducted over Petitioner's express and repeated objections and claims of Constitutional prohibitions. The questions presented as to these procedures are:

I. Whether Petitioner was entitled to make proof of these procedures described in his Motion to Quash under the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152, and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687.

II. Whether the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152 and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687, that a Defendant is entitled to make his proof in support of claims of Federal Constitutional right, is limited to racial discrimination cases.

III. Whether these procedures described in the Motion to Quash show a denial of due process of law as guaranteed to Petitioner under Amendments V and XIV of the Constitution of the United States.

IV. Whether these procedures described in the Motion to Quash show a denial of the equal protection of the laws as guaranteed to Petitioner by Amendment XIV to the Constitution of the United States.

V. Whether these procedures described in the Motion to Quash show a denial to Petitioner of traditional grand jury procedures within the concept of the right to indictment of a grand jury as guaranteed to him by Amendment V to the Constitution of the

United States and Article I, Section 10 of the Constitution of the State of Texas.

VI. Whether the traditional rule prescribing secrecy of grand jury proceedings has as one of its purposes the protection of the accused against pre-indictment public examination of the grand jury witnesses in a proceeding in which the accused is denied the right to defend, to be represented by counsel, to cross-examine, to compulsory process, or to rebut.

VII. Whether these procedures described in the Motion to Quash are prohibited by the rule of *Estes v. Texas*, ____ U.S. ____, 85 S.Ct. 1628.

VIII. Whether the Federal standard for grand jury procedures for protection of an accused applies to a state whose Constitution guarantees the protection of indictment by a grand jury.

IX. Whether the procedures described in the Motion to Quash show a use by the prosecution of the inquisitorial system of criminal justice.

X. Whether in a Court of Inquiry under *Vernon's Tex. Code of Cr. Proc.*, Arts. 886 and 887, when the proceedings are publicly conducted and televised on the instigation of the prosecuting attorney, a person having the status of an accused is entitled under the Constitution of the United States to defend, to be represented by counsel, to cross-examine, to confrontation, to compulsory process, and to contradict and rebut.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor be deprived of life, liberty or property, without due process of law."

Amendment VI to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Sec. 1, to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Art. I, Section 10 of the *Constitution of the State of Texas* which provides as follows:

> "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process

> for obtaining witnesses in his favor, * * * and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. As amended Nov. 5, 1918."

Vernon's Texas Code of Criminal Procedure, Art. 886, which provide as follows:

> "When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint has been made and filed."

Vernon's Tex. Code of Crim. Pro., Art. 887, provides:

> "Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement."

STATEMENT OF THE CASE

The Federal questions were raised in the Court of first instance by Petitioner's Motion to Quash the Indictment (Tr. 12 to 24), and by Petitioner's Motion for New Trial (Tr. 145 to 175). They were raised in the Court of

Criminal Appeals by Petitioner's Bill of Exceptions No. I (Tr. 194 to 261), by filing with the Clerk of said Court a transcript containing the Motions to Quash and for New Trial, and by exhaustive briefs on the points followed by two Motions for Rehearing.

Petitioner's Motion to Quash is attached hereto as Appendix "E". (Pages 67 to 80). It duly set up denial of rights guaranteed by the Constitution of the United States. Detailed description of the allegations is herewith set forth at Pages 8 to 10.

When the Motion to Quash came on to be heard, on objection by the State, the trial court refused to hear any evidence on the Federal questions alleged, and summarily overruled the motion:

> "*The Court*: All right, gentlemen, I am sustaining the State's objection and will not hear evidence on the motion to quash. Motion to quash is overruled." (Tr. 221).

Thereupon Petitioner's counsel endeavored to make proof on the allegations for the purpose of a Bill of Exceptions, that the issue might be reviewed by the Appellate Courts. Again, on objection of the State, the trial court refused to permit Petitioner to make proof even for a Bill of Exceptions, notwithstanding Petitioner's counsel expressly advised such denial would prevent a full record for Appellate review:

> "*Mr. Smith*: If the Court please, without making our Bill, we could not protect our record (Tr. 222). * * * If the Court please, our position is this: under any circumstances, we are entitled to show what the facts would be in order to enable the Appellate

Court to pass upon whether or not the facts as developed constitute proper grounds for setting aside the indictment." (Tr. 223)

"*The Court*: Counsel, I believe that if any appellate action be needed, you will be fully protected in your verified motion and the overruling thereof is your exception thereto." (Tr. 224)

The allegations of the Motion to Quash set forth that the Petitioner endeavored to prove that all Anglo-American concepts of traditional grand jury procedures were violated by televised public examination of the grand jury witnessess, and the Defendant, in a public proceeding, in which Petitioner, though bearing the status of an accused, was expressly denied the assistance of his Counsel and the right in any way to defend. The allegations are summarized as follows:

In May of 1962 Petitioner was the duly qualified Judge of the Probate Court of Harris County, Texas. On May 7, 1962, the Grand Jury of Harris County, Texas, was duly impanelled, and during the month of May, 1962, in its usual and customary secret proceedings, began investigating the Petitioner and his conducting of the affairs of the Probate Court of Harris County, Texas. By June 1, 1962, the Grand Jury had not brought an indictment against Petitioner.

On June 5, 1962, the District Attorney of Harris County, Texas, Mr. Frank Briscoe, in cooperation with a Justice of the Peace, W. C. Ragan obtained an order for a so-called "Court of Inquiry" from the said Ragan for public examination of the grand jury witnesses and Petitioner without the right of Petitioner to the assistance of his

counsel or to defend. Thereupon the lawful and customary and traditional secret deliberations of the Grand Jury were postponed and delayed while the District Attorney pursued the "Court of Inquiry" in public before the said Justice of the Peace. The Petitioner expressly objected at every stage and through every lawful means to these unprecedented procedures, but over Petitioner's express objections the "Court of Inquiry" was held on June 14, 15, 16 and 18, 1962.

The "Court of Inquiry" was publicly conducted with all of the news media present and with the proceedings being broadcast by television and radio from the Courtroom. One or more members of the Grand Jury were in attendance on the "Court of Inquiry." Others were advised of the proceedings by the various news media. During the "Court of Inquiry" proceedings all of the State's witnesses against the Petitioner were publicity examined. During the "Court of Inquiry" proceedings the Petitioner himself, over his objection, was publicly examined.

Notwithstanding Petitioner bore the status of an accused in the proceedings and he and the grand jury witnesses against him were being publicly examined, before television cameras and radio recorders, Petitioner was expressly denied the right to defend and the assistance of his retained counsel in the proceedings. He was also expressly denied the right to confront the witnesses against him, the right to cross-examine the witnesses against him, the right to call witnesses in his own behalf, and the right to rebut and contradict the evidence produced by the prosecution.

Thereafter the Grand Jury was reconvened on June 20, 1962, whereupon it brought the indictment against Petitioner for a felony offense.

The Texas Constitution, Article I, Section 10, guarantees that felony offenses shall be prosecuted only on indictment by a grand jury.

The procedures used to bring this indictment had never before been used in a felony prosecution in Harris County, Texas, or any other County of the State of Texas.

The Motion to Quash further alleged that the unlawful procedures pursued denied Petitioner due process of law, the equal protection of the law, the right of Assistance of Counsel, the right of confrontation, the right of compulsory process for defense, and the right to specification of charges, all as guaranteed to him by Amendments V, VI and XIV to the Constitution of the United States. It additionally alleged that the procedures abridged his privileges and immunities as a citizen of the United States in violation of Amendment XIV to the Constitution of the United States.

The Court of Criminal Appeals disposed of the issue by the following statement in its Opinion of Affirmance:

> "We have, however, examined with care appellant's contention and adhere to the view expressed by the majority of this Court in appellant's former case, *McClelland v. State*, 373 S.W.2d 674, that the trial court's action does not constitute reversible error. This proposition is overruled." (See Appendix "A" at p. 31).

The cited earlier opinion (which reversed on other grounds) first held that the trial court erred because of the refusal to take evidence on the Constitutional claims. However, on Motion for Rehearing the majority concluded that the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152

and *Carter v. Texas*, 177 U.S. 422, 20 S.Ct. 687 applied only to racial discrimination cases:

> "However, I do not think these racial discrimination cases cited by Appellant are in point here." (See Appendix "B" at P. 53).

Appellant's two Motions for Rehearing were overruled without comment on the Federal issues.

REASONS FOR GRANTING THE WRIT

I.

In his Motion to Quash the Indictment Petitioner duly set up and claimed denial of rights guaranteed to him by the Constitution of the United States. The refusal of the trial court to hear evidence in support of the allegations was contrary to the express rulings by this Court in *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152 and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687. Both of these cases were reversed because the defendant "offered to introduce witnesses, to prove the allegations * * * and the (trial) court * * * declined to hear any evidence on the subject."

The effort of the Texas Court of Criminal Appeals to limit the rule of *Coleman* and *Carter* to racial discrimination cases is not harmonious with the recent decisions of the Supreme Court of the United States imposing Federal standards on the States in criminal prosecutions involving no racial issue. See *Griffin v. California*, ... U. S. ...., 85 S.Ct. 1229; *Stanford v. Texas*, ... U. S. ...., 85 S.Ct. 507; *Pointer v. Texas*, ... U. S. ...., 85 S.Ct. 1065; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489; *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509; *Gideon v. Wain-*

wright, 372 U. S. 335, 83 S.Ct. 792; and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684.

To approve the rationalization of the Texas Court of Criminal Appeals would be to sanction a device by which the States could circumvent the above holdings merely by denying proof of the facts. It would deny to the Supreme Court of the United States its independent prerogative to review the facts when Constitutional rights are asserted, a right heretofore jealously guarded. *Davis v. Weschler*, 263 U. S. 22, 44 S.Ct. 13 ("* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"); *Norris v. Alabama*, 294 U. S. 587, 55 S.Ct. 579 ("When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding Constitutional right.") *Smith v. Texas*, 311 U. S. 128, 61 S.Ct. 164 ("But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it related to this Constitutional right.")

In succeeding sections of the Argument Petitioner demonstrates that his Motion to Quash raised substantial Federal issues.

II.

Petitioner's Motion to Quash describes procedures of serious import to the due administration of criminal jus-

tice. By these procedures a prosecuting attorney circumvents the protections inherent in the constitutional guarantee of indictment by grand jury (guaranteed by Amendment V of the Constitution of the United States and Article I, Section 10 of the Texas Constitution), and in practical effect convicts the Defendant, before he is indicted, in a proceeding in which he is expressly denied the right to defend. It functions thus:

(1) The prosecutor brings about a recess of the grand jury and calls a "Court of Inquiry" with the cooperation of a Justice of the Peace.

(2) The prosecutor conducts the "Court of Inquiry" in public with all the news media present and with the proceedings being broadcast by television and radio. The grand jury witnesses, and the defendant, are publicly examined before the television cameras and the radio recorders.

(3) In these proceedings defendant is expressly denied representation by counsel, the right to in any way defend, the right to cross-examine, the right to rebut, and the right of confrontation.

(4) Thereafter the grand jury is reconvened, whereupon defendant is indicted, and then brought to formal trial.

After such procedures were pursued Petitioner's formal trial was a mockery for his conviction was already assured. There was little his counsel could do for him then. See *Rideau v. Louisiana*, 373 U. S. 723, 83 S.Ct. 1417; *Escobedo v. Illinois*, 378 U. S. 478, 84 S.Ct. 1758 and the dissent of Mr. Justice Black in *In re: Groban*, 352 U. S. 330, . . . , 77 S.Ct. 510, 515, approved in *Escobedo, supra.*

The wide spread pre-trial publicity by television, radio and newspaper destroyed all opportunity for Petitioner to obtain a fair trial. See *Estes v. Texas,* .... U. S. ...., 85 S.Ct. 1628, and *The Warren Commission Report on the Assassination of President John F. Kennedy* (Complete Doubleday Edition, Pages 12 and 231-242). In this connection, it should be noted that the publicity is alleged to have been instigated by the prosecuting attorney and not the result of the private enterprise of the news media. See *Delaney v. United States,* (1st Cir. 1952) 199 F.2d 107.

III.

The public examination of the grand jury witnesses and the Petitioner, without Petitioner's having the right to assistance of counsel and the rights to cross-examine, rebut, and defend is violative of all Anglo-American concepts of grand jury procedures. Counsel for Petitioner have found only two other cases where this factual situation was presented. *Shaftesbury's Case* (Bill of Indictment Against Anthony, Earl of Shaftesbury) State Trials, 33 Charles II (1681) (in which the grand jury refused to indict because the procedures were contrary to tradition), and *State v. Branch,* 68 N. Car. 186 (2d Ed. 68 N. Car. 133) (in which the indictment was quashed because of the procedures).

In *State v. Branch,* supra, the Grand Jury had first considered the evidence and refused to indict. Thereupon the trial court ordered the witness examined in public. Thereafter the Grand Jury again deliberated and brought in the indictment. On appeal the Supreme Court of North Carolina quashed the indictment decreeing as follows:

"There is nothing in our law books, and no tradition of the profession to show that such has ever been the practice or the course of the courts in this State; and *we are of opinion that the ruling of His Honor is an innovation not warranted by the law of the land.*

"The power of the Judge to require a grand jury to come into open court and have the witnesses for the State examined, *is not only opposed to immemorial usage, but is not sustained either by principle or by authority.*

* * *

"How does this innovation upon ancient usage comport with this clause of the Declaration of "Rights? It defeats it in toto. If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's Solicitor; for *the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State,* in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and, *if upon the public examination of the witnesses for the State he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defence,' instead of being, in the first place, put in the condition of a victim tied to "a stake, while his reputation is being tortured to death. If the witnesses for the State are to be examined in public, upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit* of counsel.

* * *

> "There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever 'in force and in use in the colony of North Carolina'; very certainly, such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republician government. *Why examine the witness for the State in public, without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the grand jury and influence 'the finding,' not in respect to the case but in respect to the fact?*" (Emphasis added)

Shaftesbury's Case, supra, is the basic, ancient authority for the Anglo-American tradition of pre-trial examination of the grand jury witnesses in secret. There, during the religious struggles, King Charles, his justices and the King's counsel, contrary to all precedent then existing, forced the public examination of the witnesses against Shaftesbury without his having the right to defend or challenge the witnesses. Because the Grand Jury was forced into this procedure that violated traditions ancient even then, it refused to indict and endorsed the Bill *"Ignoramus"* ("We ignore it" *Black's Law Dictionary*). The struggles on the issues apropos to the present petition are well illustrated by the following excerpts from the colloquys between Lord Chief Justice Pemberton, the Foreman of the Grand Jury, and a member named Papillon:

> "L. C. J. Gentlemen of the jury, you hear *it is desired by the king's counsel* (and that we cannot deny) *that the evidence may be publicly given,* that it may not be hereafter in the mouths of any ill minded persons abroad, to scatter any mistakes or untruths

up and down; or to slander the king's evidence, or to say anything concerning them that is not true.

* * *

"Foreman. My Lord Chief Justice, *it is the opinion of the jury, that they ought to examine the witness in private, and it hath been the constant practice of our ancestors and predecessors to do it;* and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do, if it be done in court."

* * *

"Foreman. My Lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in any thing, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret. . ."

"Mr. Papillon. Your lordship is pleased to say, that it hath been the common usage and practice; sometimes, *my lord, we have heard that that hath been the law of England, that hath never been altered from time to time,* and hath continued so, we desire your lordship's opinion upon that; as we would not do any that may be prejudicial to the king, *so we would not do the least that should be prejudicial to the liberties of the people. . .*"

"* * * Then besides, the jury do apprehend that in private they are more free to examine things in particular, for the satisfying their own conscience, and that without favour or affection; and we hope we shall do our duty."

"L. C. J. Look you, gentlemen, don't talk of this, but consider with yourselves, an examination of proofs

concerning the credibility of the witnesses is not properly before you at this time."

* * *

"Mr. Papillon. *If we are not left to consider the credibility of the witnesses, we can not satisfy our consciences.*"

* * *

"L. C. J. *The Grand Jury are to hear nothing, but the evidence against the prisoner;* therefore for you to enter into proofs, or expect any here, concerning the credit of the witnesses, it is impossible for you to do justice at that rate."

* * *

"The jury withdrew to consider the evidence, and returned the bill *Ignoramus* ("We ignore it" *Black's Law Dictionary*), *upon which the people fell a hollowing and shouting.*

"Att. Gen. My lord, let it be recorded this hollowing and hooping in a court of justice."

IV.

The Federal Courts place great sanctity on the protection of the citizen by the guarantee of indictment by grand jury. *Russell v. United States,* 369 U. S. 749, 82 S.Ct. 1038; *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270; *Ex Parte Bain,* 121 U. S. 1, 7 S.Ct. 781. It is therefore respectfully suggested that no Federal Court in a Federal Grand Jury proceeding would sanction as lawful those procedures Petitioner alleges were used against him by the State of Texas.

Texas guarantees to its citizens the protection of indictment by grand jury, *Texas Constitution, Art. I, Sec. 10.* Having adopted such a protection it should be bound to

apply the high Federal standard that would prevent such procedures as are alleged by Petitioner's Motion to Quash. Authority for its being so bound is found in *Griffin v. California,* .... U. S. ...., 85 S.Ct. 1229. (Applying the Federal test against the State of California on commenting on the failure of a Defendant to testify). *Malloy v. Hogan,* 378 U. S. 1, 84 S.Ct. 1489 (Applying the Federal test against the State of Connecticut on self-incriminating tendency of an answer justifying refusal to answer); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (Applying the Federal test against the State of Texas as to the standard for obtaining a search warrant); *Pointer v. Texas,* .... U. S. ...., 85 S.Ct. 1065 (Applying the Federal test against the State of Texas as to the right of confrontation); *Gideon v. Wainwright,* 372 U. S. 335, 83 S.Ct. 792 (Applying the Federal test against the State of Florida on the right of an indigent Defendant to appointment of counsel for his defense); *Mapp v. Ohio,* 367 U. S. 643, 81 S.Ct. 1684 (Applying the Federal test against the State of Ohio of the inadmissibility of evidence obtained by an unreasonable search and seizure); *Stanford v. Texas* (No. 40 October Term, 1964) .... U. S. ...., 85 S.Ct. 507 (Applying against the State of Texas the Federal test as to the sufficiency of the identification of "things to be seized" under a search warrant and prohibiting the issuance of General Warrant).

By these recent decisions this Court has now taken the position that the Fifth and Sixth Amendments to the Constitution of the United States are obligatory on the States. The protection of indictment by a grand jury guaranteed in the Fifth Amendment is therefore binding on the State of Texas. Included in this protection is the fundamental

tradition that the grand jury witnesses shall be examined in private that a defendant may not be pre-judged by the public before he has opportunity to defend. See *Snyder v. Massachusetts,* 291 U. S. 97, 54 S.Ct. 330 which decrees that a State cannot adopt a procedure that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

VI.

The procedures described by Petitioner's Motion to Quash are atavistic, a throwback to the inquisitions "when the Star Chamber and the Court of High Commissions cast their baneful shadow over every English Home." See *In re: Funstan,* 233 N.Y.S. 81; *In re: Gardiner,* 64 N.Y.S. 760 and *People v. Naughton,* 7 Abb. Prac. N.S. 421. They are analogous to Soviet procedures where the formal trial is but an appeal from the pretrial investigation. See Foot Note 9 to *Escobedo v. Illinois,* 37 U. S. 478, 84 S.Ct. 1758, 1763.

To examine the prosecution witnesses in public before television cameras and radio recorders without the Petitioner having the right to counsel and the right to defend is to use the inquisitorial system of criminal justice. But the States are forbidden by the Fifth and Fourteenth Amendments to adopt or use the inquisitorial process. *Malloy v. Hogan,* 378 U. S. 1, 7, 84 S.Ct. 1489, 1493 ("The marked shift to the Federal standard in State cases began with *Lisenba v. California,* 314 U. S. 219, 62 S.Ct. 280 * * * The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * The Respondent sheriff concedes in its brief

that under our decisions * * * the accusatorial system has become a fundamental part of the fabric of our society, and hence, is enforcible against the States.") *Rogers v. Richmond,* 365 U. S. 534, 541, 81 S.Ct. 735, 739 ("An underlying principle in the enforcement of our criminal law" [is] that ours is in accusatorial system and not an inquisitorial system.") See also *Griffin v. California,* .... U. S. ...., 85 S.Ct. 1229; *Murphy v. Waterfront Commission of New York Harbor,* 378 U. S. 52, 84 S.Ct. 1594 and *Escobedo v. Illinois,* supra.

VII.

The Motion to Quash alleged that the unusual procedures described therein had never before been used in a felony prosecution in Harris County, Texas, or the State of Texas (Tr. 20-21). To use them against Petitioner is to deny to him the equal protection of the law. Equality of procedures without invidious discrimination is a part of the equal protection clause. *Chambers v. Florida,* 309 U.S. 227, 60 S.Ct. 472; *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585. In the *Griffin Case* this Court decreed:

> "Providing equal justice for poor and rich, weak, and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably stey toward a fairer and more nearly equal

> application of criminal justice. In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned 'stand on an equality before the bar of justice in every American court.' "

By the abnormal procedures Petitioner was in practical effect publicly tried and convicted in a proceeding in which he was affirmatively denied the fundamental right to defend.

CONCLUSION AND PRAYER

On the facts and authorities presented the reasons for granting the Writ of Certiorari may be summarized as follows:

(1) For a state court to deny the right to make proof in support of Federal Constitutional claims is to strike at the heart of the protections of the Constitution of the United States.

(2) The procedures used against Petitioner, if allowed to become precedent, would enable a prosecuting attorney to circumvent the protections inherent in the guarantee of indictment by grand jury.

(3) The procedures used against Petitioner, if allowed to become precedent, would set the pattern for an inquisitorial system of criminal prosecution in which the defendant in practical effect would be tried and convicted without the opportunity to defend.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court of the United States grant the Writ of Certiorari to correct the errors of the Honorable Court of Criminal Appeals of the State of Texas and of the trial court whose actions it affirmed.

Respectfully submitted,

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APPENDIX "A"

CLEM McCLELLAND, Appellant
No. 37,380 vs. - - - - APPEAL FROM
THE STATE OF TEXAS, TRAVIS COUNTY
Appellee

OPINION

The appellant was convicted of the offense of Conversion from an Estate, and his penalty was assessed at 10 years confinement in the State Penitentiary.

The appellant, the former Probate Judge of Harris County, Texas, was jointly indicted with Jerry S. O'Brien. A severance having been granted, O'Brien's case was tried in Harris County where he was convicted and the conviction was upheld by this Court on appeal, 376 S.W.2d 833. The appellant was granted a change of venue and was tried before the Honorable Mace B. Thurman, Judge of the 147th District Court, of Travis County, Texas.

Gordon Robert Von Stroh, a nonresident of Texas, while in police custody, committed suicide. After the death of Von Stroh, Captain Cecil Priest, of the Houston Police Department, had a telephone conversation with the appellant McClelland, who was then Probate Judge, to determine what should be done with the property of Von Stroh. As a result of the telephone conversation, the appellant sent Jerry S. O'Brien to the Police Department to take charge and possession of the property of the deceased. McClelland informed Captain Priest that the family of the decedent, who lived out of the state of Texas, would not need to employ an attorney to care for matters of Von Stroh's estate. Jerry S. O'Brien who was appointed

as temporary administrator of the decedent's estate, was not a lawyer, and O'Brien was not represented in the estate by an attorney.

The day following the death of Von Stroh, Mr. Russell E. Dahl, the husband of the decedent's sister, came to Houston from Oregon to make funeral arrangements. While in Houston, Dahl visited McClelland's office in the courthouse and was informed by McClelland that Jerry S. O'Brien, who McClelland said was very competent, would be appointed to represent the decedent's estate. Dahl later met O'Brien and gave to him certain personal effects of the deceased which had already been delivered to Dahl. The deceased was buried in Houston. Dahl paid all of the funeral expenses and made a claim against the Von Stroh estate for $1,706.18, which claim was reflected on the inventory filed in the Probate Court. The signature of the appellant on the Court's order, approving the inventory, appraisement and list of claims, appears upon the same sheet of paper below the list of claims in which Dahl's claim is itemized. Mr. Dahl's claim was not paid, and he was not reimbursed for the funeral expenses.

The complete probate records of the deceased's estate were introduced into evidence and revealed that the total assets of the estate, including the proceeds of $3,500.00 from an insurance policy, amounted to $3,618.47. Soon after the assets of the estate had been taken into possession of the temporary administrator, and before most of the claims of the estate had been paid, the appellant McClelland entered an order authorizing Jerry S. O'Brien, a temporary administrator's fee of $2,000.00, and an attorney's fee of $500.00. The inventory, appraisement, and list of claims

were made and sworn to by O'Brien on the 2nd day of February, 1960, and were approved by the appellant on the 23rd day of February, 1960. The inventory reflects total assets of the estate in the amount of $102.89. A typed notation of the list of assets reads as follows: "Numerous Insurance policies all of which had lapsed for nonpayment. TRAVELERS LIFE INS.—group policy—which is in controversy but am in hopes of collecting same." The bank account of the Von Stroh estate in the Citizens State Bank reflects that the proceeds of the insurance policy in excess of $3,500.00 had already been paid and collected for the estate and deposited into the bank account on December 28, 1959. There is nothing in the records of the Probate Court to reflect that the proceeds of the insurance policy had been collected until March 23, 1960, when it was shown in the application of the temporary administrator, and on that day the appellant authorized the temporary administrator's fees and attorney's fees in the sum of $2,500.00.

Records from the bank account of the Von Stroh estate, in the Citizens State Bank, Houston, Texas, reflected that two checks, one in the amount of $2,000.00 and one in the amount of $500.00 were drawn on the account by Jerry S. O'Brien, the temporary administrator of the estate, pursuant to the order signed by McClelland. The account was charged with the two checks on March 31, 1960. The $2,000.00 check, payable to Jerry S. O'Brien, bore the notation "Temp. Adm. Fees per court order #67899". The check for $500.00, payable to Jerry S. O'Brien, bore the notation "Attorney fees per court order #67899". The balance of the account remaining after these withdrawals was $1,118.47. Subsequent withdrawals to pay legitimate

claims of the estate reduced the principal on deposit to $283.65.

Records from the same bank revealed that the check for $2,000.00 was deposited into O'Brien's personal account on March 31, 1960.

Records from O'Brien's bank account show that the day following, on April 1, 1960, a check for $500.00 was drawn by O'Brien and made payable to appellant, Clem McClelland. It bore the marginal notation in typed letters "Legal services", and an additional handprinted marginal notation "Insurance matter".

The $500.00 check drawn on O'Brien's account and made payable to the appellant was shown to have been endorsed by McClelland with his signature, and was deposited into his personal account in the Bank of the Southwest in Houston, Texas. The deposit slip reflecting this deposit bears the transit number of the Citizens State Bank and the notation "Legal Services".

During the trial of the case, the state introduced into evidence properly authenticated copies of applications and orders from numerous other estates in which the appellant had, while Probate Judge, awarded attorney's fees to Jerry S. O'Brien. Representative of such cases was the case of Ben Ernest Waite, deceased. The records revealed that the total assets of that estate amounted to $353.06. There were disbursements from the estate by Jerry S. O'Brien as temporary administrator of $10.00 for a bond premium, and $30.00 for court costs. The remaining balance was $313.06. The appellant then entered an order of the Court granting to Jerry S. O'Brien attorney's fees in the amount of $156.53, and temporary administrator's fees in the

amount of $156.53. The two payments entirely depleted the assets of the estate. It was further shown that no attorney was actually appointed to represent Jerry S. O'Brien as temporary administrator of that estate.

The State urged the admission of these numerous other transactions in order to show the intent, system, scheme and design of the appellant McClelland, a probate Judge, as a principal, along with Jerry S. O'Brien, in converting funds from estates under the guise of their being attorney's fees. It was the state's theory that these transactions showed that there had been no mistake in the Court's ordering attorney's fees paid in the instant case, and was also strong evidence of the intent of the appellant to appropriate and convert the money taken from the Von Stroh estate.

The appellant did not testify and offered the testimony of no witnesses in his behalf.

The evidence reveals that the total assets of the estate amounted to approximately $3,700.00. Approximately $900.00 in court costs and claims were paid. McClelland had knowledge of the claim for funeral expenses, which was entered on the inventory filed in the court, and which had the highest legal priority, and it was not paid. The temporary administrator's fee of $2,000.00 and the attorney's fee for $500.00 nearly depleted the estate, and was far from reasonable under the circumstances. The appellant, while Judge of the Probate Court, was paid an attorney's fee by O'Brien. The jury apparently adopted the view that this was actually a payment to appellant from the Von Stroh estate. The evidence of the numerous other transactions, as represented by the case of Ben Ernest Waite, we think, supplied the requisite unlawful intent which is an integral

part of the offense, and showed the absence of any exonerating mistake of fact on the part of the appellant. In the absence of any testimony on behalf of the appellant, the jury was authorized to believe, and apparently did believe that such was the case. As this Court said in the companion case of O'Brien v. State, 376 S.W.2d 833, in which the evidence was substantially identical, the evidence is amply sufficient to show the guilt of the appellant McClelland as a principal, along with Jerry S. O'Brien, of the conversion from the estate of Gordon Von Stroh. The evidence here is amply sufficient for support of the Jury's verdict.

In a voluminous brief, the appellant has presented to this Court five points upon which he relies for reversible error. Most of these points relied upon by appellant have all been considered by this Court recently in the cases of the co-indictee O'Brien, and in the former case of the appellant. O'Brien v. State, 376 S.W.2d 833, and McClelland v. State, 373 S.W.2d 674.

We shall limit our discussion of some of these points in the interest of brevity and in order not to be repetitious.

We shall consider the propositions in the order that they are raised and presented by appellant.

Appellant first contends that the trial court erred in refusing to hear evidence on his motion to quash the indictment before granting a change of venue. We have carefully examined the rather long document in the transcript denominated a Bill of Exception. It is not certified by the trial court as being true and correct, the motion to quash is not included within this bill. It is not even incorporated by reference to the bill. The bill does not

recite and the court does not certify that a motion to quash was made in writing. This complained of error is not before us for review. Ticer v. State, 313 S.W.2d 301; Stephen v. State, 293 S.W.2d 789. We have, however, examined with care appellant's contention and adhere to the view expressed by the majority of this Court in appellant's former case, McClelland v. State, 373 S.W.2d 674, that the trial court's action does not constitute reversible error. This proposition is overruled.

Appellant next contends that the evidence is not sufficient to sustain the conviction of appellant as a principal, and that the state has failed to establish the corpus delicti. We shall pretermit a discussion of this point for the reason that our views and our position are set forth in detail in appellant's former appeal, McClelland, supra, and in our opinion in O'Brien v. State, 376 S.W.2d 833. This contention is without merit.

The third contention brought forward by appellant is that the trial court erred in permitting proof of extraneous crimes during the development of the state's case in chief. We think that this contention was adequately disposed of and fully discussed in O'Brien, supra. Additionally, we are convinced that "intent" is an essential element of the crime of conversion. This contention is without merit.

Appellant's fourth proposition is that the trial court erred in failing to charge upon exculpatory statements. Appellant adopts the view that the check given him by O'Brien with the notation: "Legal services—insurance matter", constituted an exculpatory statement. We have again read the numerous decisions of this court upon the necessity of

a trial court charging upon exculpatory statements. It is our view that the evidence adduced by the state does not come within the purview of either an exculpatory confession nor an admission. We are convinced that the landmark case of Otts v. State, 116 S.W.2d 1084 and the many subsequent decisions following Otts' case, do not bring evidence of the type herein complained of within the realm of exculpatory statements. We find no error in the action of the trial court in refusing appellant's charge upon exculpatory statements.

Lastly, appellant complains of the action of the trial court in refusing to charge the jury affirmatively that they must acquit appellant if they found from the evidence or had a reasonable doubt thereof, that the grand jury could reasonably have ascertained the name or names of the heirs and distributees interested in the Von Stroh estate by the use of reasonable diligence. We do not feel that the evidence warranted such a charge. The testimony adduced by the state from a former member of the grand jury supports the trial court's position. No error is reflected by the action of the trial court in this respect.

The remaining informal bills have also been carefully examined, and we find no reversible error reflected by any of them.

The judgment of the trial court is affirmed.

McDonald, Presiding Judge

(Delivered January 6, 1965.)

CLEM McCLELLAND, Appellant

v.

The State of Texas, Appellee

No. 57,380

Appeal from Travis County

OPINION ON APELLANT'S MOTION FOR REHEARING

Appellant takes this Court to task for our original disposition of his contention that the extraneous offenses were not admissible. He says our statement that "intent is an essential element of the crime of conversion" will hereafter make extraneous offenses admissible in numerous cases simply because intent is an essential element of many crimes. Our opinion is not to be so construed. We stated earlier in our opinion the State's theory as to their admissibility. We here observe that Jones v. State, 376 S.W.2d 842, is the authority upon which the trial court admitted the collateral offenses and supports his ruling. He gave the same charge as he gave in Jones v. State, supra.

The motion for rehearing is overruled.

Belcher, Judge

(Delivered March 10, 1965)
Opinion approved by the Court.

APPENDIX "B"

Clem McCLELLAND, Appellant,

v.

The STATE of Texas, Appellee.

No. 35837.

Court of Criminal Appeals of Texas.

June 29, 1963.

On Rehearing Dec. 11, 1963.

Second Rehearing Denied Jan. 15, 1964.

J. Edwin Smith, Jack Rawitscher, Smith & Lehmann, Houston, Skelton, Bowmer & Courtney, Byron Skelton, Jim D. Bowmer and Bob Burleson, Temple, for appellant.

Frank Briscoe, Dist. Atty., Houston, Samuel H. Robertson, Jr., Carl E. F. Dally and Gus Zgourides, Asst. Dist. Attys., Houston, and Leon B. Douglas, State's Atty., Austin, for the State.

DICE, Commissioner.

The conviction is under Art. 1538, Vernon's Ann.P.C., for conversion of an estate; the punishment, ten years.

Trial was in the 27th Judicial District Court of Bell County upon a change of venue from Harris County.

The indictment returned into Criminal District Court No. 5 of Harris County, omitting the formal parts, charged that:

> "* * * on or about the 19th day of December, A.D. 1960, in said County and State, RICHARD H. PUTNEY was the administrator of the estate of Clara L. Currie, deceased, and as such had in his charge the estate, real, personal and mixed, of the said Clara L. Currie, and the said RICHARD H. PUTNEY and CLEM McCLELLAND, acting together as principals, did then and there unlawfully and with intent to defraud the heirs and distributees interested in such estate (the said heirs and distributees being to the Grand Jurors unknown), convert to their own use a part of the property of said estate, to-wit: ten thousand dollars in money, the same being then and there of the value of ten thousand dollars."

Upon the granting of a severance, appellant, Clem McClelland, was, by order of the court, tried first.

The state's proof shows that appellant was the duly elected, qualified, and acting Judge of the Probate Court of Harris County, Texas.

On September 10, 1960, Mrs. Clara L. Currie died intestate, in Harris County, leaving an estate consisting of both real and personal property of the appraised value of approximately $160,000.

On September 16, 1960, Richard H. Putney, appellant's co-indictee and a practicing attorney in the city of Houston, was appointed temporary administrator of Mrs. Currie's estate. His bond in the sum of $25,000 was approved by appellant.

On October 11, 1960, the administration was by appellant's order made permanent and the administrator's bond fixed at $5,000. On October 17, the said Richard

H. Putney qualified as administrator of the estate by taking the oath and executing a bond that was approved by appellant in his official capacity.

Upon the trial, Putney was called as a witness by the state.

He testified that on December 19, 1960, he went to appellant's office and presented to him an application and order which he had prepared for a fee to be paid to him as administrator of the estate. Appellant, at such time according to the witness, acted upon the application by inserting in the space left blank in the order for the amount of the fee the figure $10,000, stating that it was an unusual case and he (Putney) would need assistance with it. He further testified that appellant stated to him that the fee would be divided between them, "an even split", and instructed him to deposit his share to the account of Tierra Grande, Inc., in the Citizens State Bank, of Houston. The witness stated that he proceeded directly from appellant's office to the Citizens State Bank, where he drew a check on the Currie estate for $10,000, of which he deposited $9,500 to his personal account and retained $500 in cash. He related that he then wrote a check for $5,000 on his personal account, which he deposited in the bank to the account of Tierra Grande, Inc., and that he took a duplicate deposit slip for the $5,000 deposit to appellant's office, at which time he did not see him but left the deposit slip on his (appellant's) desk. The witness stated that he furnished appellant with a copy of the application and order for the attorney's fee and that the last time he saw the papers they were on appellant's desk. He also stated that he had no intention of investing in Tierra Grande, Inc.,

at the time of making the $5,000 deposit and that months later, in June, 1962, he received two stock certificates for 2,500 shares, each, in the corporation, from a man by the name of Bryson Martin. He further stated that at the time appellant instructed him to deposit his share in the Citizens State Bank he wrote on a slip of paper: "Tierra Grande, Inc., Citizens State Bank." The slip of paper was introduced in evidence and shown by a handwriting expert to be in appellant's handwriting.

Other evidence and testimony were offered by the state to corroborate the testimony of the accomplice witness Putney.

Appellant did not testify or call any witnesses in his behalf.

Appellant insists that if the evidence be sufficient to corroborate the accomplice, it is insufficient to sustain his conviction as a principal, but, viewed from the state's standpoint, shows him to have been an accomplice to the crime.

With this contention, we agree.

Articles 65-69, V.A.P.C., define who are principals in the commission of an offense.

Article 65, supra, provides that

> "All persons are principals who are guilty of acting together in the commission of an offense."

The succeeding Articles 66-69, supra, prescribe the manner in which one may become a principal in the commission of a crime.

The six definitions prescribed by these articles have been set out by this court in the case of Middleton v. State, 86 Tex. Cr.R. 307, 217 S.W. 1046, as follows:

> "(1) When A. actually commits the offense, but B. is present, knowing the unlawful intent, and aids by acts or encourages by words.
>
> "(2) When A. actually commits the offense, but B. keeps watch, so as to prevent the interruption of A.
>
> "(3) When A. is actually executing the unlawful act, and B. engages in procuring aid, arms, or means of any kind to assist while A. executes said unlawful act.
>
> "(4) When A. actually commits the offense, but B., at the time of such commission, is endeavoring to secure the safety or concealment of A., or of A. and B.
>
> "(5) When A. employs an innocent agent, or by indirect means causes the injury, or brings about the commission of the offense.
>
> "(6) When A. advises or agrees to the commission of the offense, and is present when the same is committed, whether he aid or not."

Of the six ways in which one may be a principal to a crime, two require his presence at the time the crime is committed, and four make him a principal, though physically absent.

[1] Under the statutory definitions of a principal, whether the person be present or not when a crime is committed he must be actually doing something which associates him with the execution of the unlawful act

at the very time it is done, to make him a principal. Schwartz v. State, 158 Tex.Cr.R. 171, 246 S.W.2d 174.

An accomplice is defined in Art. 70 of our Penal Code, as follows:

> "An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or
>
> "Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,
>
> "Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or,
>
> "Who prepares arms or aid of any kind, prior to the commission of an offense for the purpose of assisting the principal in the execution of the same."

In the early case of Cook v. State, 14 Tex.App. 96, this court, in setting out the distinction between an accomplice and a principal, said:

> "The acts constituting an accomplice are auxiliaries only, all of which may be and are performed by him anterior and as an inducement to the crime about to be committed (Penal Code, Arts. 79 to 85 inclusive); whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished or not."

In 2 Branch's Ann. P.C. 2d Ed., Sec. 710, at page 8, it is stated:

> "If the defendant on trial was not present when the offense was committed and was doing nothing in aid of the common design when the offense was committed, he would not be a principal although the facts support the theory that he was both an accomplice and accessory, or a receiver of stolen property, or either."

In Hankamer v. State, 142 Tex.Cr.R. 23, 150 S.W.2d 794, it was held, in a prosecution under Art. 1538, supra, that *the conversion of funds of an estate was complete the moment the administrator formed the intent to use the money for his private personal use and did so use it.*

The facts in the instant case do not show that appellant was present when Putney withdrew the funds from the estate at the bank. Nor is there any proof that at the time Putney withdrew the funds appellant was doing any act in furtherance of their agreement to take the money from the estate.

Under the facts, appellant was not shown to be a principal to the crime of conversion of the estate but was shown to be merely an accomplice thereto.

[2] In this state, an accomplice cannot legally be convicted of a felony as a principal. See: 2 Branch's P.C., Sec. 710, pages 7-9, and cases there cited.

Parnell v. State, 170 Tex.Cr.R., 30, 339 S.W.2d 49, relied upon by the state, is not here controlling, because, as shown in the opinion in the case, the accused was present at the time of the conversion of funds from the corporation.

Middleton v. State, supra, also relied upon by the state, is not here controlling, because in that case the accused was present at the time of the homicide and doing certain acts in furtherance of the conspiracy to kill the deceased.

By formal Bills of Exception Nos. 9, 10, and 11, appellant complains of the court's refusal, prior to ordering change of venue of the cause, to hear evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, and of the Fifth and Fourteenth Amendments to the Constitution of the United States.

By such refusal, the trial court has deprived this court and the Supreme Court of the United States of the opportunity to review appellant's constitutional claim.

In refusing to permit appellant to submit proof in support of the motions, the court erred. Rothschild v. State, 7 Tex.App. 519, and Juarez v. State, 102 Tex. Cr.R. 297, 277 S.W. 1091.

[3-5] Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion

of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted.

The judgment is reversed and the cause is remanded.

Opinion approved by the court.

MORRISON, Judge (concurring).

It has been suggested that the offense in question was committed when the order allowing the fee was allegedly signed by the judge. This position cannot be sustained because the alleged order does not appear to have been entered in the records of the Probate Court and there is an entire absence of any testimony that it was necessary or that it was ever used to effect the withdrawal of the monies in question; therefore, we cannot base an opinion upon it. Nor can the position be maintained that the money was not appropriated until it found its way into the possession of appellant because this statute could not be violated by appellant who was not a member of a class capable of committing this crime.

While the opinion of this Court may not meet with popular approval, the writer, at least, should not be subject to criticism because I pointed out as early as 1952, in an article which appears in Volume 1 of the Penal Code, that, as I saw it, the Legislature should abolish the distinction between accomplices and principals. More than ten years have passed since such article was published, and the Legislature has not seen fit to change the law.

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, can have no application here because the accused in that case was actively participating in the offense at the time it occurred, just as was Parnell, and neither case involved conversion of the funds of an estate as we have here and as we had in Hankamer v. State, supra.

Regardless of the change, the fact remains that in all cases affirmed by this Court holding the accused to be a principal he was actually doing something at the time of the commission of the offense in the furtherance of its commission.

Whether or not the writer is sound in the above conclusions, three other reversible errors appear in this record, as pointed out in Judge Dice's opinion, with which I concur entirely.

WOODLEY, Presiding Judge (dissenting).

The offense charged was not one which the appellant, acting alone, could commit. He stands convicted for having acted together with Putney who was alleged and shown to be Administrator of the Currie Estate. There was no allegation in the indictment to this effect but the evidence shows that the appellant was the Judge of the Probate Court who appointed Putney as administrator. As Probate Judge he was charged with the responsibility of seeing that Putney performed his duties, and shared with Putney the duty of preserving the property of the estate, that it might be delivered to those lawfully entitled to receive it and to no one else.

The indictment alleged that Putney and the appellant acting together as principals converted to their own use

$10,000.00 in money which was part of the property of the Currie Estate. The court's charge properly instructed the jury to the effect that proof of conversion of $50 or more of the money would be sufficient.

The theory upon which the conclusion is reached that the Judge of the Probate Court was an accomplice rather than a principal to the conversion of a part of the property of the Currie estate is that the offense was committed at the bank and was complete when the administrator "formed the intent to use the money for his private personal use and did so use it."

As to the $5000 belonging to the estate which, pursuant to the conspiracy, finally was appropriated to the use of the Probate Judge, there is no evidence or suggestion that the administrator at any time had the intent to use any part of this $5000 *for his private personal use, or that he did so use it.*

The contention that the appellant was not a principal in the commission of the offense is quite similar to that we overruled in Parnell v. State, 170 Tex.Cr.R. 30, 339 S.W.2d 49.

This is not a simple case where thieves break in and steal property that is in the possession of its owner. Here the door was open by reason of the positions of trust occupied by the conspirators and, in violation of such trust and of the statute, property of others entrusted to their care and custody was converted to their own use and benefit.

As in Parnell v. State, supra, the offense was not committed by a single act.

The money belonging to the Currie estate was under the control of the administrator and was in his possession. He

had the power to use or convert it, but no lawful right to do so without an order of the Judge of the Probate Court.

The administrator retained possession of the $5000 that was appropriated to the personal use of the appellant until it was so converted and appropriated as the appellant and the administrator had agreed.

There was evidence to the effect that the money deposited in the Tierra Grande Inc. account was withdrawn under the appellant's directions beginning the next day for his personal use or benefit.

The *intent* that the funds of the estate be converted to their own use was complete when the judge signed an order and the administrator accepted and acted upon it, the agreement being that $5000 of the amount would go to the judge. The check by which the $10,000 was withdrawn from the checking account of the estate and deposited to the personal checking account of the administrator shows on its face that the court's order was its basis. It bore the notation "One-half attorney's fees, one-half expenses of estate as per court order December 19, 1960."

The appellant made the fraudulent order which authorized the withdrawal under the unlawful conspiracy, and it was accepted. He directed the administrator where his $5000 was to be placed. He was present as that term is used in reference to the law of principals when the offense was committed.

Suppose that the administrator had had the $10,000 belonging to the estate in cash in his pocket and, having obtained the order, had left half of it at a hiding place designated by the judge where he later found it!

Could it be said that the judge was not a principal because he was not present at the hiding place when the money was left there for him?

Stripped of the devious means used to cast an air of legitimacy upon the transaction and to conceal their crime and avoid its consequences, the supposed case is in essence the case before us.

Suppose that having drawn the $10,000 check, the administrator had obtained in cash the part which it was agreed would go to the appellant and had carried it to the appellant. Would this Court reverse because the appellant was not with the administrator when the $10,000 check was drawn?

As we said in Parnell v. State, supra:

> "There is no settled mode in which appropriation of money or property of the principal by the officer authorized to receive and handle it must take place. It may occur in numberless ways, and the appropriation consummated in any manner capable of effecting it.
>
> "In many classes of cases the question as to what acts are sufficient to show an appropriation is one of great difficulty.
>
> "So long as the person entrusted with the money or property of another acts in accordance with the terms of his trust in reference thereto he is not guilty of embezzlement. He may deposit the money of his in the bank in his own name without being guilty of appropriating it. But a withdrawal by him for purposes of his own constitutes appropriation, 16 Tex.Jur. 70; or constitutes evidence of conversion. 16 Tex.Jur. 38, 39."

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, is a case where a conviction for theft by false pretext from one Goolsbee was affirmed, Holt having been present and participated when false representations were made to Goolsbee at Warren, in Tyler County, but was not present when his co-conspirator thereafter extracted $20,000 in money from Goolsbee at Beaumont, in Jefferson County.

This Court declined to follow the view that would narrow the commission of the crime to the very minute the money was delivered and said:

> "We think the correct view is that the time of the crime of theft by false pretext extended from the beginning of the transactions when appellant first visited the Goolsbees until their loot was divided and that the place was in Warren, Tyler County, as well as near the hotel in Beaumont, Jefferson County."

Had the appellant's order been legally proper and genuine, the drawing and cashing of the $10,000 check would not have constituted conversion of property of the estate, or any other offense. It was, however, a fraudulent and unlawful order. Half of the money was to be and was converted to the use of the appellant. There remained the securing of the safety of the conspirators from detection by proper entry in the records of the order of the appellant as probate judge authorizing the pretended attorney's fees without disclosing that the money was to be shared equally with him, and the approval of the administrator's account.

It is true that the probate judge could not commit the offense alone. It is equally true that without the judge's participation the administrator could not have committed

it with any degree of hope that he could escape detection and punishment, and would not have shared the money converted with the judge.

The parties acted together as principals, as did the parties in Parnell v. State. If the appellant was not present as that term is used in applying the law of principals, Parnell was not present when the conversion for which he was convicted as a principal occurred.

If the majority is correct in holding that the appellant was an accomplice to the conversion and not a principal, Parnell was not a principal though he was convicted as such and the conviction was affirmed.

For cases where the defendant whose conviction as a principal was affirmed, though he was not at the time in position to have committed the offense himself and was doing nothing at the time the offense was committed by his co-conspirator other than waiting some distance away to carry out his part in the conspiracy, see White v. State, 154 Tex.Cr.R. 489, 228 S.W.2d 165; Gonzales v. State, Tex.Cr.App. 350 S.W.2d 553; Hill v. State, 135 Tex. Cr.R. 567, 121 S.W.2d 996; Stubblefield v. State, Tex.Cr. App., 334 S.W.2d 150.

The holding of the majority that the appellant was not a principal to the conversion will preclude another trial upon the indictment, hence there is no occasion to consider other claims of error.

I respectfully dissent.

ON STATE'S MOTION FOR REHEARING

McDONALD, Judge.

Most of the opinion reversing this cause on original submission was devoted to the distinction between a principal and an accomplice. The majority opinion held that the appellant was not a principal; that the evidence was insufficient to sustain his conviction as such and viewed from the state's standpoint shows him to have been an accomplice to the crime.

The writer approved the opinion written by Judge Dice on original submission and wrote no opinion thereon. Judge Morrison concurred and Presiding Judge Woodley dissented. I now recede from my original position so far as the appellant being a principal is concerned.

[6] I think that appellant was a principal, rather than an accomplice. I do not agree with Presiding Judge Woodley that Parnell's case, 170 Tex.Cr.R. 30, 339 S.W.2d 49, cited in his dissenting opinion is in point with the case at bar. I say this for the reason that Parnell was present during the course of the conversion. He was present at the Executive Committee Meeting on June 8th, and at the stockholders meeting on August 15th.

I also disclaim Hankamer's case, 142 Tex.Cr.R. 23, 150 S.W.2d 794, cited in our original opinion as authority to support my views therein expressed. Hankamer was an administrator "converting on his own", without any assistance from the county or probate judge. The portion excerpted from his case and cited in the original opinion follows a discussion in his case of the time of various conversions to refute a claim advanced by Hankamer that

limitation had run on his offenses, if any. This Court said:

> "He had unquestionably converted the $66.55 to his own use and benefit before he ever made any payment of the premium on the bonds. The conversion was complete the moment he formed the intent to use the money for his private personal use and *did so use it.*"

No other person was present, nor was any action on the part of any other person required for Hankamer to complete the conversion in his case. He was unlike Putney, the co-principal and administrator in this cause. He was acting on his own. Putney was acting with the appellant, or the appellant with him, they were acting together, as I shall hereinafter set forth. The writer has carefully reviewed all of the cases cited by the State and the appellant, along with numerous other cases dealing with the law of principals and accomplices. Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, cited by Presiding Judge Woodley in his dissenting opinion, supports the view that I now entertain. The writer desires to direct attention to Judge Graves' concurring opinion in Holt, supra, in which he cites numerous cases, among them being: Middleton v. State, 86 Tex.Cr.R. 307, 217 S.W. 1046 and Mason v. State, 31 Tex.Cr.R. 306, 20 S.W. 564, which Judge Graves refers to as being "the true doctrine that should be followed" so far as the law of principals is concerned. Judge Simkins wrote the unanimous opinion in Mason's case. I shall not here lengthen this opinion by quoting from either case, but I do feel that both cases support my position. Whether Putney needed the Order from appellant, allowing the $10,000.00 attorney's fee, isn't clear. Appellant did not exercise his statutory duty to conserve and

preserve the funds of the estate, he passively sat by and allowed Putney to withdraw the money. The appellant set Putney in motion to perpetrate the offense just as effectively as Middleton did Osment in the murder case, Middleton, supra. It is true that Middleton struck no blow with the hammer, nor did appellant even touch the pen when Putney cashed the check at the bank, and yet, the two cases are parallel.

Cochrain v. State, 93 Tex.Cr.R. 483, 248 S.W.43, involved an appellant whose part in the transaction was "to pretend to be dead", which he did. In this case Southwestern Life Insurance Company paid out $5,000.00 to Cochrain's wife, based upon a conspiracy that he had died. He, of course, was not present when the money was paid to his wife. He played "dead" and the appellant herein played like Putney was an honest administrator, and he sat back and silently allowed Putney to convert at least $5,000.00 from the Currie estate and place it on deposit for the use of appellant, or in a bank account controlled by appellant. It is quite coincidental that Cochrain's case is even identical to the case at bar as to the sum of money involved, as well as being authority for my position.

[7] The writer feels that we were in error in holding in our original opinion that the trial Court erred in refusing to allow appellant, prior to ordering a change of venue of the cause, to adduce evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, Vernon's Ann.St., and of the Fifth and Fourteenth Amendments to the Constitution of the United States, which complained

of errors appellant has brought forward by formal Bills of Exception Nos. 9, 10, and 11. Art. 1, Sec. 10, Constitution of Texas protects the rights of an accused in all criminal prosecutions. It does not encompass grand jury action. Rothschild v. State, 7 Tex. App. 519, cited in our original opinion was a case involving an allegation that an unauthorized person was present during the deliberations of the grand jury. The case was reversed because the trial court refused to permit proof by the appellant on this issue. The record in the instant case discloses that appellant was permitted to make proof herein on his allegation that unauthorized persons were present at the time the grand jury deliberated. The trial court met the requirement of Rothschild, and that case does not support our original view, from which I now retreat. In Juarez v. State, 102 Tex.Cr.R. 297, 277 S.W. 1091, the trial court refused to permit appellant to make proof that he had been purposely discriminated against in the selection of the grand jury which returned the indictments against him. Appellant herein makes no such claim. (The trial court here did refuse to permit appellant to make an inquiry into what evidence the grand jury considered at the time of the return of the indictment.) It has long been the law that the character of testimony or the quantum of proof had before the grand jury cannot be inquired into on a motion to quash the indictment. Article 506, Vernon's Ann.C.C.P., Note 6, citing numerous cases. The foregoing article of our Code of Criminal Procedure does not provide for quashing as indictment against a Negro because it was found by a grand jury from which all persons of the African race had been excluded because of their race or color. Yet such a procedure to quash has been held to be a timely mode of presenting the objection, under the Constitution and laws

of the United States, as set forth by appellant's able attorneys. However, I do not think these racial discriminatory cases cited by appellant are in point here.

The case of Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed2d 663, cited by appellant is not in point as it is bottomed on the refusal of the trial court to grant a change of venue. We have no such question before us in the case at bar. The trial court changed the venue of appellant's case. He was tried in Belton, Texas, approximately 200 miles from Houston, Texas, where appellant alleges the complained of publicity took place.

I shall now direct my attention to what I regard as the reversible errors in this case. My views and my position are that the State's Motion for Rehearing should be denied. In this court's original opinion by the majority, Judge Dice, speaking for the court, said, "Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted."

Further elaboration as to these matters was not deemed necessary due to the court's disposition of this cause. I feel it will be desirable to elaborate and clarify my position through a more labored discussion of the law applicable and direct attention to the errors I regard as reversible.

The indictment returned on June 20, 1962, alleges that the appellant on or about December 19, 1960, did unlawfully, with intent to defraud, convert to his own use $10,000 in money from and belonging to the Estate of Clara L. Currie.

It is undisputed that the state relies for a conviction upon the withdrawal of $10,000 by Putney's check dated December 19, 1960, drawn on and paid out of the Currie Estate as authorized by the appellant, and the unlawful conversion thereof of any sum of money of over fifty dollars. The state adopted the view in briefing this case.

To support the allegations of the indictment the state called the witness, Putney, who testified on direct examination, that he presented an application to appellant, as Probate Judge, for an order approving attorney's fees in the sum of $10,000; that appellant signed the order approving the application but said instruments were left on the desk of the Judge (appellant) and they were never produced at the trial. The bank records reveal that on presentation by Putney of the $10,000 check, he received $500 in money, deposited $9,500 to his personal account, and then drew a $5,000 check on his personal account which he deposited to the account of Tierra Grande, Inc., shown to be controlled by appellant, and that this money was withdrawn for the benefit of appellant.

On cross-examination, by the appellant of Putney, he testified that he had made approximately 50 odd withdrawals of money from the Currie Estate without a court order from the appellant, aggregating in excess of $25,000, *which he had converted to his own use and had shared none of the proceeds with the appellant.*

The state on re-direct examination, over appellant's objection, introduced evidence of another withdrawal by Putney, pursuant to appellant's oral instruction, of $15,000 on January 24, 1961, for the purchase of stock in the Southwest Equities Corporation.

For the admission in evidence of the said $15,000 stock purchase the District Attorney of Harris County argued to the trial Judge that:

> "We think it is in response to the cross-examination with reference to the defendant's knowledge of withdrawals from the estate without a written order. This is such a transaction. My position is that it is admissible to rebut—that all of the withdrawals that were made without an order were made unknown to the defendant."

Thus, it was the theory of the state that it should be allowed to offer evidence in rebuttal, showing that Putney acted in other transactions upon an oral court order by appellant, other than the single order approving the attorney's fee of $10,000. Over timely and proper objection, the evidence was admitted.

In addition to the $15,000 stock purchase, the state proffered the testimony of Putney about a prospectus and the notation appellant had made on it. In the absence of the jury the testimony shows that Putney had seen a prospectus

of the Southwest Equities Corporation, and that appellant had written on this prospectus: "Mrs. Currie subscribed for 1,000 shares." After objection had been made, the Court then stated that he would not admit the prospectus, but he would permit the notation "which is ascribed to the defendant, that Mrs. Currie subscribed to 1,000 shares." The Court stated: "The Court understands that the purpose of the State here is to show that the witness had purported oral authority in other transactions other than the one involved." The Harris County District Attorney then stated: "Yes, and that such withdrawals were made to the knowledge of the defendant, without proper order of the Court." Then, in the presence of the jury, the witness, Putney, was asked to identify an exhibit, which *he stated was a prospectus of Southwest Equities Corporation, that he had seen it in Judge McClelland's office,* that McClelland instructed him to buy the stock and *that McClelland made the notation on the prospectus: "Mrs. Currie subscribed to 1,000 shares";* that Putney then withdrew the $15,000.00 from the Currie estate and invested it in stock of the Southwest Equities Corporation, pursuant to McClelland's oral instructions. The Court then admitted the portion of the prospectus bearing the above-quoted notation.

Following the withdrawal of the $15,000 from the Currie Estate for the purchase of stock on January 24, 1961, proof was made by the State that there were two substantial withdrawals of money totaling over $100,000 from the Currie Estate in connection with two loans made by Putney. One, in the sum of $40,000.00 to Bayou Production Company on March 28, 1961, and the other in the amount of $61,000.00 to C. W. Calhoun, Trustee, on June 16, 1961, both transactions clearly showing no conversion on

the part of the appellant, but they give a strong inference of wrongdoing on his part and no doubt aroused suspicion on the part of the jury as the District Attorney asked the question: "Does the Probate Code specifically provide for loans to be made from the estates of decedents?", which, although unanswered, no doubt caused appellant material harm by leaving an inference that the appellant had violated the law under the Probate Code. These were loans to third parties. However, I observe that the state had previously on direct examination, adduced from the witness, Putney, that following the events that he described December 19, 1960, that he subsequently make various withdrawals from the account of Clara L. Currie on many occasions without a court order or without permission of the court and that he approximated to the best of his recollection that these withdrawals amounted to $25,800.00 and some odd cents.

I do not think that the evidence was admissible. The State was actually attempting to bolster or to impeach their own witness. Had they ben correctly desirous of introducing this testimony to rebut, then they were rebutting their own witness, which amounts to nothing more than impeaching one's own witness. They did not show surprise nor hostility on the part of the witness, Putney, and I think this evidence was clearly inadmissible. Neither do I think that this testimony was admissible to bolster the state's witness. The state saw fit to adduce upon direct examination testimony which they later regarded as unfavorable to them, and yet they wanted to bolster their own witness with some transactions highly prejudicial to the appellant. The state also was not only getting before the jury evidence which it contended would rebut, but

also "that such withdrawals were made to the *knowledge of the defendant,* without proper order of the Court." If I correctly interpret the view of the state, it was their position that the stock purchased from Southwest Equities Corporation and the two loans, all having been made with an order from the Probate Judge (the appellant), and he having knowledge of such transactions, for he ordered them made, would also refute Putney's testimony that he converted over $25,000.00 to his own use, sharing none of it with appellant. It would in effect charge appellant with knowledge of Putney's misapplications or conversions on 50 odd different occasions. In the face of Putney's testimony about his various independent acts of conversion, I see no similarity in these three transactions, but I do see appellant being greatly prejudiced by this testimony. Here is an estate shown by the record to be worth approximately $160,000.00 in its entirety. Testimony was then admitted showing three transactions, totaling $116,000.00 and the one transaction for $10,000.00 for which appellant was on trial. I think the testimony about these transactions no doubt caused the jury to feel that appellant was probably, along with Putney, out to steal the entire estate and that said testimony was highly prejudicial and inflammatory to appellant's rights to a fair and impartial trial and that it caused the jury to render a verdict for a greater punishment than they would have rendered absent this prejudicial evidence. Viewing the three transactions totaling $116,000.00 in the suspicious light that the jury no doubt saw them, they probably decided that appellant was just a petty thief to only be taking $10,000.00 as charged; so the additional evidence of the one hundred thousand dollars plus transactions removed any doubt from their minds as to

appellant's guilt. The jury probably computed that here was a Probate Judge, with his co-principal, who stole $126,000.00 in four transactions, or about three-fourths of the entire estate of $160,000.00.

Assuming for the sake of argument that the evidence of these three transactions was admissible to prove either intent, system or identity, or in developing the res gestae, so as to bring it within one of the exceptions to the general rule of admissibility as to extraneous offenses or transactions, the trial court imposed no limitations upon his instructions to the jury as to these transactions, over appellant's timely objection. For this error alone the cause should be reversed.

For the reasons stated, the State's Motion for Rehearing is overruled.

MORRISON, Judge (concurring).

Remaining convinced of the soundness of the original opinion holding the appellant to be an accomplice rather than a principal and my concurrence therewith, I would add only the following.

While I agree with the result, I cannot bring myself to agree with the assumption not supported by evidence that appellant's proof as to the unconstitutionality of the grand jury's action must necessarily have come from what occurred within the grand jury room and not from the holding of the highly publicized court of inquiry. We, as a Court, have no authority to make such an assumption against an accused, or to speculate as to the nature or quality of the proof which might have been adduced had the court permitted it. I further take issue with my brother

McDonald in his statement that the constitutional guarantees do not encompass grand jury action.

I viewed Judge DICE's discussion of the proof of extraneous offenses as grounds for reversal as will be seen from my original concurrence herein. I concur in the overruling of the State's motion for rehearing.

WOODLEY, Presiding Judge (dissenting).

It is regrettable that the views of the Judges of this Court as to the controlling principles of law and their application are so divergent that the numerous and lengthy opinions herein will be of little value as legal precedent or as authority in any case other than that before the Court.

The majority opinion on original submission reversed this conviction upon the holding that the evidence showed appellant's guilt as an accomplice, but not as a principal.

[6] Judge McDONALD's opinion on rehearing states his present view that such holding was wrong and that the evidence is sufficient to sustain the conviction of the appellant as a principal. Thus, the conclusion that the evidence is sufficient to sustain appellant's conviction as a principal becomes the majority holding.

[7] The writer concurs in the conclusion of Judge McDONALD that the court in Harris County did not err in refusing to hear testimony regarding what evidence the grand jury considered in returning the indictment against the appellant.

This holding of the majority leaves only the supposed errors on the trial in Bell County which were not relied upon in Judge DICE's opinion as ground for reversal, but

were the basis of the admonition to the trial court not to admit certain evidence and to limit certain evidence "upon another trial."

On original submission there was no occasion for the Court to consider these claims of error because another trial upon the indictment had been precluded by the holding that the appellant was not a principal, as the indictment charged.

The evidence which Judge McDONALD holds inadmissible as showing extraneous offenses relates to property belonging to the Currie Estate and the actions of the appellant as County Judge, and of the administrator Putney in regard thereto. This evidence was admissible. If it showed or tended to show any offense it was not an extraneous offense but the offense charged in the indictment, namely the conversion of property belonging to the Currie Estate by the administrator, the appellant acting with him as a principal.

It is not controlling that the state elected to stand upon the conversion of $50 or more of the proceeds of the $10,000 check. The allegations of the indictment, not the case submitted to the jury, determines what evidence is admissible and what is extraneous.

It is incorrect to assume that the state was limited by the indictment to the proceeds of the $10,000 check drawn on the account of the Currie Estate. The court properly charged the jury that proof of conversion of $50 or more belonging to the estate would be sufficient. In the jury's absence the trial judge stated, in ruling upon an objection: "Gentlemen, the indictment alleges the theft of $10,000

from the estate. It does not say what $10,000 was taken from the estate."

The first reference to the Southwest Equities Corporation transaction was when Putney testified on cross-examination that he had been indicted "on the $15,000 Southwest Equities check." Thereafter the state offered the prospectus and proof regarding the appellant's connection with Southwest Equities Corporation, but the careful trial judge ruling in the absence of the jury admitted only the notation ascribed to the appellant, the check and the testimony of Putney that the appellant told him to issue it but no court order was obtained.

The first reference to a loan made from the Currie Estate was also on Putney's cross-examination regarding a transfer of funds belonging to the estate from a Savings and Loan Association to a checking account when Putney testified: "That was at the time that we were making the loan for the estate."

Also the final account of Putney was introduced as State's Exhibit S-26 wherein the loans and Southwest Equities Corporation $15,000 investment are listed. Also Putney testified on cross-examination about the loans and interest thereon.

The complained of testimony went no further than to show that loans were authorized and made for the Currie Estate.

In view of the above, appellant has no ground to complain.

Much has been written about Putney's testimony elicited by the defense as to withdrawals he made and converted

to his own use which the appellant did not authorize and about which he was not advised.

To make this part of the evidence complete attention is directed to Putney's explanation made and repeated that he drew the money in violation of the law, knowingly, in anticipation of fees and made false statements on the checks "simply to assure myself that I would not have to split any more fees * * * I did not intend to divide any more fees."

Also, the record shows that evidence was elicited by the defense showing that Putney, with the knowledge of the appellant, sold $40,278.24 worth of Texaco Inc. stock belonging to the Currie Estate a month before he obtained a court order to do so. And on his cross-examination Putney testified that he sold U.S. Treasury Bonds belonging to the Currie Estate with the knowledge of the appellant but without obtaining a court order.

I see no error in the failure of the court to limit the evidence mentioned in his charge.

I respectfully dissent from the overruling of the State's motion for rehearing.

APPENDIX "C"

In The 147th Judicial District Court
of Travis County, Texas

NO. 34,134

THE STATE OF TEXAS, Appellee
V.
CLEM McCLELLAND, Appellant

SENTENCE OF THE COURT

On this the 19th day of May, A. D. 1964, this cause being again called, the State appeared by her District Attorney and the defendant Clem McClelland being in open court in person in charge of the Sheriff of Travis County, Texas, for the purpose of having the sentence of the law pronounced against him in accordance with the finding of the court and the judgment of the court heretofore entered in this cause, and the defendant being asked by the court if he had any sufficient reason why the sentence of this court should not be pronounced against him, failed to give such reason; whereupon the court proceeded, in the presence of the said defendant, to pronounce sentence against him as follows:

It is the ORDER of this court that the said defendant, Clem McClelland who has ben adjudged guilty of the offense of the Conversion of an Estate be and he is hereby sentenced to confinement in the State Penitentiary for an indeterminate term of not less than two (2) years nor more than ten (10) years, and that he be taken by the

authorized agent of the State of Texas or by the Sheriff of Travis County, Texas, and by him safely conveyed and delivered to the Superintendent of said State Penitentiary, there to be confined in the manner and for the period aforesaid.

To which action of the Court, the defendant then and there in open court excepted and gave notice of appeal in open court, from the ruling of this Court, to the Court of Criminal Appeals of Texas, at Austin, Texas.

And inasmuch as the said defendant has given notice of appeal herein, the execution of this sentence is deferred to await the judgment and order of the Court of Criminal Appeals of Texas, at Austin, Texas, in this behalf.

Entered this the 19th day of May, 1964.

MACE B. THURMAN, JR.
Judge

APPROVED AS TO FORM:

TOM BLACKWELL
District Attorney

APPENDIX "D"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS, AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,380 styled:

CLEM McCLELLAND, Appellant

vs.

THE STATE OF TEXAS, Appellee

judgment of the 147th Judicial District Court of Travis County, was affirmed on January 6, 1965, Appellant's Motion for Rehearing overruled March 10, 1965, Appellant's 2nd Motion for Rehearing overruled without written opinion, on April 21, 1965, and mandate issued May 21, 1965.

THEREFORE, with the overruling of Appellant's 2nd Motion for Rehearing, this Cause was disposed of by this Court on April 21, 1965, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the Court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of Said Court, at office, in Austin, Texas this 28th day of June, A. D. 1965.

GLENN HAYNES, *Clerk*
Court of Criminal Appeals of Texas

APPENDIX "E"

NO. 101,112

In The Criminal District Court No._____
Harris County, Texas

THE STATE OF TEXAS
V.
JERRY S. O'BRIEN and CLEM McCLELLAND

DEFENDANT CLEM McCLELLAND'S
MOTION TO QUASH INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Clem McClelland, and files this, his Motion to Quash the Indictment brought against him in this cause, showing as grounds therefor the following:

I.

Prior to the bringing of the indictment in this cause, and over the objection of the Defendant, The State of Texas, acting through the District Attorney of Harris County, Texas, the Honorable Frank Briscoe, and on the petition, initiation, and instigation of the District Attorney, conducted a so-called "Court of Inquiry" concerning the matters alleged against this Defendant in the indictment. The so-called "Court of Inquiry" was held in public and began on the 14th day of June, 1962, before the Honorable W. C. Ragan, Justice of the Peace of the Justice Court of Harris County, Texas, Precinct One. The so-called "Court of Inquiry" continued throughout the

day of June 14th, throughout the day of June 15th, until the hour of Noon on June 16th, and until the hour of Noon on June 18th. The so-called "Court of Inquiry" being held in public, the witnesses for the State were examined in public by the Honorable Frank Briscoe, District Attorney of Harris County, Texas, and his assistants.

Notwithstanding that the "Court of Inquiry" was inquiring into alleged offenses against the laws of the State of Texas in the processing of various estates by the Probate Court of Harris County, Texas, of which Court the Defendant was Judge, and notwithstanding that the Defendant was subpoenaed and ordered under protest to testify, as a "witness" in said "Court of Inquiry", during the so-called "Court of Inquiry", Defendant was denied the right to know in advance of the "Court of Inquiry", the nature and cause of the accusations to be inquired into, was denied the right of confrontation of the witnesses testifying in the "Court of Inquiry", was denied the right to cross-examine and contradict the witnesses testifying in the "Court of Inquiry", was denied the right to have compulsory process for obtaining witnesses in his favor, was denied the right to rebut the testimony brought by the State, was denied the right to show that no offenses had occurred, and was denied the right to be represented by counsel and to consult with counsel during the proceedings in the "Court of Inquiry."

Long prior to the convening of the "Court of Inquiry", the Grand Jury that brought this indictment against the Defendant had been impanelled and convened on the 7th day of May, 1962, by the Honorable Sam W. Davis, Judge of the Criminal District Court No. 5 of Harris County,

Texas. This Grand Jury was functioning at the time the District Attorney petitioned for the "Court of Inquiry", at the time the "Court of Inquiry" was ordered by Honorable W. C. Ragan, and at all the time that the "Court of Inquiry" was in public session.

Prior to the convening of the "Court of Inquiry" the District Attorney had taken before the Grand Jury two witnesses concerning the investigation of the Probate Court of Harris County, Texas, but no indictment was returned by the Grand Jury prior to the "Court of Inquiry".

As a result of the public examination of the State's witnesses in the "Court of Inquiry", the proceedings in the "Court of Inquiry", and extensive amounts of the testimony in the 'Court of Inquiry" were by newspapers, radio and television published throughout Harris County and large sections of the State of Texas. In addition, the "Court of Inquiry" being public, many members of the public were in attendance at the "Court of Inquiry" and heard the public examination of the State's witnesses.

The conduct of the "Court of Inquiry" and the public examination of the State's witnesses vitiates this indictment because under the Constitution of The State of Texas and the Laws of The State of Texas, and the Constitution of the United States, this Defendant was and is entitled to be charged by an indictment brought only by proper and lawful proceedings of a Grand Jury. Proper and lawful proceedings of a Grand Jury in due course of law of the land and in due process of law require that the examination of the State's witnesses be in the secrecy of the Grand Jury proceedings until formal accusation by indictment is brought according to law. The State's witnesses having been

publicly examined in the "Court of Inquiry" and not in the secrecy of Grand Jury proceedings this indictment has not been brought by a Grand Jury according to the course of the law of the land and has not been brought according to due process of law.

The public examination of the State's witnesses in the "Court of Inquiry" under the circumstances and conditions existing and the State's witnesses not being examined in secret proceedings of the Grand Jury this Defendant has been denied the right to answer for a criminal offense of the grade of felony only on the indictment of a Grand Jury, in violation of the prohibitions of Art. 1, Sec. 10 of the *Constitution of The State of Texas*, and of Amendment V of the *Constitution of the United States*.

II.

The mode and manner in which the "Court of Inquiry" was held, all as alleged above, denied to this Defendant his rights, privileges and immunities guaranteed to him by the *Constitution of The State of Texas*, and by the *Constitution of the United States*. Without waiving this general allegation of the denial of his constitutional rights and privileges, but still insisting on same, and pleading expressly in the alternative, this Defendant shows that the so-called "Court of Inquiry", as conducted and as described above, denied to this Defendant the following constitutional rights, privileges and immunities, and violated the following prohibitions of the *Constitution of The State of Texas* and of the *Constitution of the United States*:

(1) It denied to this Defendant equal rights as guaranteed to him by Article I, Section 3, of the *Constitution of The State of Texas*.

(2) It denied to him the equal protection of the law as guaranteed to him by Amendment XIV of the *Constitution of the United States.*

(3) It denied to him the right to demand the nature and cause of the accusation against him, and to have a copy thereof as guaranteed to him by Article I, Section 10, of the *Constitution of The State of Texas,* and by Amendment VI of the *Constitution of the United States.*

(4) It denied to him the right to be confronted by the witnesses against him as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(5) It denied to him the right to be represented by counsel and to have the assistance of counsel during the proceedings in the "Court of Inquiry" as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(6) It denied to him the right to have compulsory process for obtaining witnesses in his favor as guarranteed by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(7) It denied to him the privileges and/or immunities of a Citizen of the State of Texas as guaranteed to him by Article I, Section 19, of the *Constitution of the State of Texas* and abridged his privileges and/or immunities as a Citizen of the United States as guaranteed by Amendment XIV of the *Constitution of the United States.*

(8) It denied to him the due course of the law of the land as guaranteed him by Article I, Section 19, of the *Constitution of the State of Texas* and due

process of law as guaranteed to him by Amendment V and XIV of the *Constitution of the United States.*

(9) It denied to him the right, immunity and privilege of answering to a criminal offense of the grade of felony only on the indictment of a Grand Jury in that the traditional Grand Jury procedures of having the State's witnesses examined in the secrecy of Grand Jury proceedings were violated, with the resulting violation of the provisions of Article I, Section 10, of the *Constitution of the State of Texas* and Amendment V of the *Constitution of the United States.*

(10) It inflicted upon this Defendant, prior to formal accusation by indictment of a Grand Jury, cruel and unusual punishment as prohibited by Article I, Section 13, of the *Constitution of the State of Texas* and Amendment VIII of the *Constitution of the United States.*

The violation of the foregoing privileges, rights and immunities, and the denial of them to this Defendant vitiates and voids the indictment, and estops the State to assert the indictment against this Defendant, and estops the State to prosecute this Defendant on-the indictment. In this connection this Defendant shows that the denial of his constitutional rights, privileges, and immunities was brought about by the purposeful, willful and intentional acts and decisions of the State of Texas acting by and through its duly qualified and acting agent and District Attorney of Harris County, Texas, the Honorable Frank Briscoe.

Further in this connection this Defendant shows that in petitioning for, instigating, and conducting the "Court of Inquiry" as described above the Honorable Frank Briscoe, District Attorney of Harris County, Texas, acted under

color of State authority and/or under color of State law. He purposefully, intentionally, and willfully, under color of State authority and under color of State law, instigated, promoted and conducted procedures that denied to this Defendant fundamental rights and constitutional rights guaranteed to this Defendant by the *Constitution of the State of Texas* and the *Constitution of the United States.* The violation of these rights, individually and cumulatively, vitiates and voids the indictment.

III.

Defendant shows that during the "Court of Inquiry" one or more members of the Grand Jury that voted for the indictment attended the proceedings in the "Court of Inquiry." He shows further that one or more members of the Grand Jury that voted for the indictment either by newspapers, by radio, by television, or by other methods, were informed of the proceedings in the "Court of Inquiry" and of testimony and evidence produced before the "Court of Inquiry." Defendant shows that the "Court of Inquiry" constituted undue influences and coercion on the Grand Jury prior to the bringing of the indictment. He shows that the Grand Jury prior to the bringing of the indictment, and at the time of bringing of the indictment, was subjected to the undue influences and coercion produced by the "Court of Inquiry", and was subjected to various and other undue and unlawful influences.

IV.

There was extensive publicity by all of the news media of the county, beginning on or about the 1st day of June, 1962, concerning the affairs of the Probate Court of Har-

ris County, Texas, and related to the Defendant herein, which publicity was substantially incited, stimulated and aggravated by the District Attorney of Harris County, Texas, and by his assistants, and by other State and County officials of Harris County, Texas. Such publicity was precipitated, incited, stimulated and aggravated by the District Attorney and his assistants in examining the State's witnesses in public in a so-called "Court of Inquiry." The publicity resulting, and particularly that publicity resulting from the acts and conduct of the District Attorney and his assistants in conducting the so-called "Court of Inquiry" and in examining the State's witnesses in public prior to indictment, affected, influenced and infected the deliberations of the Grand Jury.

V.

Defendant shows that the so-called "Court of Inquiry" was, by the District Attorney and the Grand Jury, made a part of the Grand Jury proceedings and deliberations in a three-step proceeding as follows:

(1) Before the convening of the "Court of Inquiry", the District Attorney and the Grand Jury brought before the Grand Jury witnesses concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant.

(2) Then the legal, proper, usual and customary deliberations of the Grand Jury concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant were adjourned, interrupted, postponed and delayed until a so-called "Court of Inquiry" could be conducted with the State's witnesses being examined in public. One or more of the grand jurors attended the "Court of Inquiry"; those who

did not attend the "Court of Inquiry" were informed of its proceedings and the testimony before it by all of the modern news media and by other means.

(3) Next, the "Court of Inquiry" was recessed and the Grand Jury was reconvened when the Grand Jury again took under consideration the investigation of the affairs of the Probate Court of Harris County and of this Defendant, and returned this indictment against this Defendant without the testimony of any further witnesses.

These procedures constituted unlawful and unconstitutional Grand Jury procedures in violation of the laws and *Constitution of the State of Texas* and of the *Constitution of the United States.*

VI.

Defendant shows that for many decades in all types of felony accusations the District Attorney's Office of Harris County, Texas, has used the usual, proper, customary and traditional grand jury procedures wherein the examination of the State's witnesses was in the traditional secrecy of grand jury sessions. To the best of Defendant's knowledge and belief the three-step procedure used by the District Attorney's Office in the bringing of the present indictment has never before been used in Harris County, Texas, or in the State of Texas. Defendant shows that such procedures deprive him of due process of law and the due course of the law of the land under the laws and *Constitutions of the State of Texas and of the United States,* and deprive him of the equal protection of the laws, in violation of the provisions of the laws and *Constitutions of the State of Texas and of the United States.*

VII.

Because of the three-step procedures as described in Paragraph V, *supra,* the indictment brought in this cause is not an indictment by Grand Jury, for the usages, customs and traditions of Texas Jurisprudence, Federal Jurisprudence and English Jurisprudence are that the State's witnesses shall be examined in secrecy in grand jury proceedings and not publicly examined as was done by the District Attorney, a state official, in this cause. For such reason the indictment should be quashed and this cause dismissed. The constitutional guaranty of the State of Texas, Article I, Section 10, guarantees to this Defendant that he shall not be held to answer for a criminal offense of the grade of felony "unless on an indictment of a grand jury." As previously stated, this indictment is not the indictment of a Grand Jury according to the traditions, customs and usages of grand jury procedures. In this connection the Defendant again shows and urges that public examination of the State's witnesses and the use of the three-step procedures described in Paragraph V, *supra,* was deliberately instigated by the District Attorney and was an abuse by him of the laws of the State of Texas.

VIII.

Defendant further shows that the indictment should be quashed for the reason that the District Attorney purposely and intentionally instigated the "Court of Inquiry" and the public examination of the State's witnesses in the "Court of Inquiry" without the Defendant having the right of cross-examination, rebuttal, contradiction, calling witnesses in his own behalf and the representation of coun-

sel in the "Court of Inquiry", all with the purpose and intent of prejudicing the public of Harris County, Texas, and the potential jurors of Harris County, Texas, against the Defendant, and with the additional purpose and intent of creating conditions in Harris Couty, Texas, and a climate of public opinion in Harris County, Texas, prejudical to the Defendant which would make it impossible for the Defendant to have and obtain a fair and impartial trial and a fair and impartial jury in Harris County, Texas, which is the county where Defendant resides, and the county where the offense is alleged to have occurred. Such acts and conduct on the part of the District Attorney deprives the Defendant of due process of law, the due course of the law of the land, and the equal protection of the laws.

In this connection Defendant shows that under the due course of the law of the land he was entitled to be tried for the alleged offense in Harris County, Texas, the county of his residence and the county where the alleged offense is alleged to have occurred. He was further entitled, under the law of the land, to have a fair and impartial trial and a fair and impartial jury in said County of Harris. The purposeful and intentional acts on the part of the District Attorney have deprived Defendant of such rights.

IX.

As further grounds for quashing this indictment, the Defendant shows that in the "Court of Inquiry" the District Attorney and his assistants purposely and intentionally introduced testimony in the nature of gossip, hearsay and other type of testimony which would not be in any way admissible against the Defendant in a Court of Law. Question and Answer reports of such inadmissible testimony,

gossip and hearsay were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. In addition Defendant shows that much of the evidence introduced in the "Court of Inquiry" that was prejudicial to Defendant related to alleged criminal derelictions and alleged official misconduct outside the charges of the present indictment. Question and Answer reports of such inadmissible testimony were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. Thus the prospective jurors of Harris County, Texas, have had presented to them evidence that would be inadmissible on a trial of this cause. This was purposely precipitated and brought about by the District Attorney and was an abuse of the Laws of The State of Texas, and was a violation of the *Laws and Constitution of The State of Texas* and of the *Constitution of the United States.* For these further reasons the indictment should be quashed.

X.

Defendant further shows that the violation of due process of law, the due course of the law of the land and of the constitutional privileges and immunities, including the equal protection of the laws, all as guaranteed to him by the *Constitution of The State of Texas* and by the *Constitution of the United States,* whether such violations are considered singly or cumulatively, have been so great and so numerous that their prejudicial effect cannot be removed. For such further reasons the indictment should be quashed.

XI.

The indictment is fatally defective in that it fails to allege sufficient elements of the offense of "conversion of

an estate" in that it fails to allege that the Defendants, Jerry S. O'Brien and Clem McClelland, were in possession and care of the $2,500.00 as Administrators of the Estate of Gordon Robert Von Stroh, Deceased.

WHEREFORE, premises considered, Defendant prays that the indictment be quashed, set aside and vacated and that Defendant be discharged.

Respectfully submitted,

J. EDWIN SMITH
J. Edwin Smith

JACK J. RAWITSCHER
Jack J. Rawitscher
Attorneys for Defendant,
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Of Counsel

THE STATE OF TEXAS (
)
COUNTY OF HARRIS (

I, the undersigned Clem McClelland, Defendant in the above styled and numbered cause, on oath state that the matters of fact recited in the foregoing Motion are true and correct.

WITNESS my hand at Houston, Harris County, Texas, this 15th day of October, 1962.

CLEM McCLELLAND
Clem McClelland

SUBSCRIBED and sworn to before me, the undersigned authority, on this the 15th day of October, A. D. 1962.

IRENE BOSWELL

(Notary Seal)

Notary Public in and for
Harris County, Texas

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant, Clem McClelland, certify that a true copy of this Motion was delivered to the Office of the Honorable Frank Briscoe, District Attorney of Harris County, Texas, on the 4th day of December, 1962.

J. EDWIN SMITH

4 December 1962
E. B. DUGGAN
Judge Presiding

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NO. 345

IN THE

Supreme Court of the United States

October Term, 1965

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

FRANK BRISCOE
District Attorney
Harris County, Texas

SAMUEL H. ROBERTSON, JR.
Assistant District Attorney
Harris County, Texas

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NO. 345

IN THE

Supreme Court of the United States

October Term, 1965

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

To The Honorable Supreme Court Of The United States:

NOW COMES Respondent, The State of Texas, and respectfully files this its brief in opposition to the Petition for Writ of Certiorari.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported as *McClelland v. State of Texas*, 389 S.W.2d 678.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under Title 28 U.S.C.A., Section 1257(3).

The Respondent denies that there is a substantial federal question presented for review by this Honorable Supreme Court.

QUESTIONS PRESENTED

The question presented is whether the State trial judge on hearing the motion to quash the indictment erred in refusing to permit the Petitioner to offer proof in his attempt to prove that the Grand Jury returning the indictment considered evidence that was alleged to have been illegally obtained?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provision relied upon by the Petitioner are the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, Article 1, Section 10 of the Constitution of the State of Texas, and Articles 886 and 887 of Vernon's Annotated Code of Criminal Procedure of the State of Texas.

STATEMENT OF THE CASE

The Respondent denies each and every allegation of fact stated and the unfounded inferences drawn by the petitioner in his petition except as the facts are supported by the record.

The petitioner was the former Probate Judge of Harris County, Texas. He was jointly indicted as a principal with

Jerry S. O'Brien, the administrator of the estate of Gordon Robert Von Stroh, for the offense of unlawfully converting money from the decedent's estate. After a severance was granted O'Brien was tried, sentenced to be confined for ten years in the penitentiary and is now serving that sentence, *O'Brien v. State,* 376 S.W.2d 833. The petitioner requested and was granted a change of venue. After receiving continuances the petitioner was not tried until almost two years following the date of his indictment. He was tried and convicted in Travis County, Texas, and was sentenced to serve a term of ten years in the State Penitentiary.

The facts relating to the commission of the offense as presented by the record are concisely and well stated by the Court of Criminal Appeals in their opinion and as stated will be adopted for the purposes of this Brief. This opinion is reported in 389 S.W.2d 678 and is appendix "A" of Petitioner's petition.

All felony cases in Texas must be prosecuted upon an indictment returned by a Grand Jury. Article 1, Section 10 of the Constitution of the State of Texas

Independent and separate from Grand Jury investigations the Texas Code of Criminal Procedure provides that a Magistrate may call witnesses in a Court of Inquiry to determine whether criminal offenses have been committed. Articles 886 and 887 of Vernon's Annotated Code of Criminal Procedure of the State of Texas.

In June 1962, a magistrate in Harris County, Texas, convened a Court of Inquiry to inquire into the suspected unlawful conduct in the processing of cases in the Probate Court. The Petitioner and other witnesses were subpoenaed

by the Magistrate. Petitioner and other witnesses appeared and testified without invoking their privilege against self-incrimination.

A subsequent Grand Jury investigation resulted in the return of a number of indictments for offering and accepting bribes, perjury, and conversion from various estates against the petitioner and several lawyers, appraisers and representatives of various estates.

The Petitioner only alleges and the record shows no more than that one member of the Grand Jury which returned the indictment attended the Court of Inquiry and that other members of the Grand Jury, as members of the public generally, were informed of the unlawful acts in the administration of the Probate Court by the news media coverage of the Court of Inquiry.

When the Petitioner was called for trial and before he was granted a severance and a change of venue he filed a motion to quash the indictment on the grounds that the Grand Jury, before returning the indictment, considered evidence obtained in the Court of Inquiry in which Court of Inquiry Petitioner had allegedly been deprived of constitutional rights.

ARGUMENT AND REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petitioner has here alleged that he was deprived of constitutional rights because on his Motion to Quash the indictment, the trial court refused to permit him to show that the Grand Jury which returned the indictment considered evidence which was incompetent and illegally obtained. He alleged that the Grand Jury returning the

indictment had considered evidence obtained from a Court of Inquiry. He further alleged that the Petitioner was deprived of constitutional rights in the Court of Inquiry which rendered such evidence incompetent and illegal. His conclusion is that the Grand Jury considered the evidence obtained in the Court of Inquiry, which he alleges was incompetent and illegal, and therefore the resulting indictment is void.

The Petitioner does not allege that any of the testimony or evidence adduced and received at the Court of Inquiry was utilized in the trial of his case in Travis County, Texas. He does not even allege that any knowledge gained in the Court of Inquiry was so utilized.

Under Petitioner's allegations, just as was said by the Court in *Lawn v. U. S.*, 355 U.S. 339, 350, 78 S.Ct. 311, 318:

> "It should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminating testimony in legal proceedings. . . ."

It is the State's position that even if the Petitioner's allegations were true that the Grand Jury did consider evidence adduced at the Court of Inquiry before returning the indictment against the defendant, that this would not render the indictment void.

In Texas, all felonies must be prosecuted on an indictment returned by a Grand Jury. Unlike most States, a felony cannot be prosecuted upon an information brought by the prosecuting officer. It has been long held in many

cases that an indictment will not be rendered void, regardless of what evidence the Grand Jury may or may not have considered before returning the indictment. *Crain v. State,* 14 Tex. 634; *Cotton v. State,* 43 Tex. 169; *Terry v. State,* 15 App. 66; *Jacobs v. State,* 35 Crim. 410, 34 S.W. 110; *Clark v. State,* 43 S.W. 522; *Choice v. State,* 54 Crim. 520, 114 S.W. 132; *Lee v. State,* 66 Crim. 567, 148 S.W. 567, 40 L.R.A. N.S. 1132; *Edwards v. State,* 73 Crim. 380, 166 S.W. 518; *Holliman v. State,* 108 Crim. 92, 299 S.W. 249; *Hyde v. State,* 123 Crim. 248, 58 S.W. 2d 533; *Barnes v. State,* 134 Crim. 461, 116 S.W.2d 408; *Morrison v. State,* 41 Tex. 516; *Dockery v. State,* 35 Crim. 489, 34 S.W. 281; *Chapman v. State,* 49 S.W. 587; *Buchanan v. State,* 41 Crim. 129, 52 S.W. 769.

It is respectfully urged that the rules of law applicable to the allegations here made by the Petitioner are those stated in: *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311; *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406; *Beck v. Washington,* 369 U.S. 541, 82 S.Ct. 955 and *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2.

In *Lawn v. United States,* 355 U.S. 339, 349, 78 S.Ct. 311, 317, this Court followed and restated the language from the case of *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 408, which reads as follows:

> "In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 4, 54 L.Ed. 1021, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused.' The Court refused to hold that such an indictment should be quashed, pointing out that 'The abuses of criminal practice would be en-

> hanced if indictments could be upset on such a ground.' 218 U.S. at page 248, 31 S.Ct. at page 4. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay'. If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

This Court, in the *Costello case* and reaffirmed by the *Lawn* case, refused to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence", saying:

> ". . . It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Costello v. United States,* 350 U.S. 359, 364, 76 S.Ct. 406, 409; and quoted in *Lawn v. United States,* 355 U.S. 339, 350; 78 S.Ct. 311, 318.

In discussing the identical issue here presented in the case of *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, it was said:

> ". . . (N)either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand

> jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof * * *.' United States v. Reed, 27 Fed. Cas. pages 727, 738, No. 16,134."

That the Petitioner's reliance upon the cases of *Coleman v. Alabama,* 377 U.S. 129, 84 S.Ct. 1152; *Carter v. Texas,* 177 U.S. 442, 20 S.Ct. 687; *State v. Branch,* 68 N. Car. 186 (2d Ed 68 N. Car. 133); *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417; *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758; *In Re Oliver,* 333 U.S. 257, 68 S.Ct. 499; *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623; *Pointer v. Texas,* 379 U.S. 815, 85 S.Ct. 1065; and *In re Groban,* 352 U.S. 330, 77 S.Ct. 510, is unfounded may be easily demonstrated.

In *Coleman v. Alabama,* 377 U.S. 129, 84 S.Ct. 1152, it was held to be improper to refuse to permit Coleman to offer evidence on his motion for new trial to support his claim that Negroes had been arbitrarily and systematically excluded from sitting on the Grand Jury which indicted him. In *Carter v. Texas,* 177 U.S. 442, 20 S.Ct. 687, it was held to be error where the defendant was not permitted to make proof on his motion to quash the indictment where the allegation, if proved, would have entitled him to have the indictment quashed. In the instant case if the allegations made by the Petitioner were all true he would not have been entitled to have the indictment quashed. Consequently he was not injured by the trial court's refusal to accept the proffered evidence. (The Petitioner was on the hearing of the motion to quash the indictment, permitted to offer but failed to prove his allegations that unauthorized persons were present during the time the Grand Jury deliberated.)

The early case of *State v. Branch,* 68 N. Car. 186, decided by the Supreme Court of North Carolina is easily distinguished from the facts here presented as was done by the Court of Criminal Appeals in their opinion affirming another case against this same Petitioner in which he was found guilty of the offense of accepting a bribe, *McClelland v. State,* 390 S.W.2d 777, 782, where the Court said:

> "In State v. Branch, 68 N. C. 186, cited by appellant, the witnesses upon whose testimony the indictment was presented were examined before the Grand Jury in open Court."
>
> "No such procedure or facts are presented in the case before us."

In *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, the trial court refused to grant a change of venue. Three members of the convicting jury had witnessed on television an "interview" soon after his arrest between Rideau and the Sheriff in which Rideau confessed to incriminating facts. The Petitioner McClelland was granted a change of venue from Harris County to Travis County, Texas, and his trial at his request, was long delayed. It is not even alleged in the case at bar that the jury trying the case on its merits had any knowledge of the Court of Inquiry.

In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, Escobedo made a confession after having demanded and having been denied assistance of counsel. The confession was introduced into evidence upon his trial and was used to obtain his conviction. In the Petitioner McClelland's case, he has not even alleged (because he cannot) that any evidence that may have been obtained in the Court of Inquiry was introduced into evidence upon his trial in this case.

The cases of *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, were contempt cases which grew out of the one man Grand Jury system used in the State of Michigan. In the Petitioner McClelland's case, he alleges no connection between the Court of Inquiry and the trial of this case, other than the Grand Jury considered evidence adduced at the Court of Inquiry before returning the indictment.

In the very recent case of *Pointer v. Texas*, 379 U.S. 815, 85 S.Ct. 1065, it was held the use during his trial of a transcript of a witness' testimony at a preliminary hearing denied the defendant his right to confront and to cross-examine by counsel the witness against him, where he had not been represented by counsel at the preliminary hearing. In the Petitioner McClelland's case, it is not even alleged that the evidence gained in the Court of Inquiry was introduced upon his trial.

In the case of *In re Groban*, 352 U.S. 330, 77 S.Ct., 510, Groban had refused to testify in secret without counsel before the Ohio State Fire Marshall. Upon his refusal, he was imprisoned. The majority of the Court affirmed the lower court on the grounds he was not entitled to counsel during an investigative procedure. The Petitioner here relies upon, and quotes from the dissent. Actually, the dissent was on the grounds that "the judgment below should be reversed because it is contrary to due process of law to imprison appellant for refusing to testify before the Deputy Fire Marshall in secret". 352 U.S. 340. Here the Petitioner McClelland has complained not because an attempt was made to interrogate him in secret, but because his testimony at a public court of inquiry, where he did not invoke his privilege against self-incrimination, re-

sulted in too much publicity. Petitioner McClelland is not here, as Groban was, complaining of imprisonment because of his failure to answer questions at the Court of Inquiry.

Clearly, all of the cases relied upon by the Petitioner are not in point and may be distinguished from his case and the allegations he has made in support of his Petition.

Any complaint the Petitioner has regarding publicity he may have received due to the Court of Inquiry is answered by the fact that he was granted a change of venue from Harris County to Travis County, Texas, and upon his motions for continuance, there was a delay of almost two years between the Court of Inquiry and his trial upon this case.

The Petitioner does not now allege in his Petition, he did not allege in the Motion to Quash in the trial court, and he has never contended that the Grand Jury which returned the indictment was biased or prejudiced against him.

CONCLUSION AND PRAYER

In conclusion, the only allegation which the Petitioner makes is that his case should be reversed because of the failure of the trial court to permit him to show on the Motion to Quash the indictment that the Grand Jury considered illegal evidence before the indictment was returned. In view of *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311; *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406; *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955; and *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2,

the law is clear that there is not a constitutional requirement that Grand Jury indictments be based upon legally competent evidence. The inescapable conclusion of Petitioner's argument, which is untenable, is that he was deprived of constitutional rights at a Court of Inquiry, and therefore, he may never be tried for any offense coming within the scope of the Court of Inquiry.

Wherefore, it is respectfully requested that this petition for certiorari to the Court of Criminal Appeals of Texas be denied.

Respectfully submitted,

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SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, postage prepaid, to Petitioner's Attorney, Mr. J. Edwin Smith, Scanlan Building, Houston 2, Texas, on this_____ day of August, 1965.

CARL E. F. DALLY
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NO. 508

IN THE

Supreme Court of the United States

October Term 1965

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Clem McClelland, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in the above entitled cause.

OPINIONS OF THE COURT BELOW

The Opinion and judgment of the Court of Criminal Appeals of Texas in the above entitled cause is reported as *McClelland v. State of Texas*, 390 S.W.2d 777; a copy is

attached as Appendix "A" (Pages 25 to 34). The Opinion in a companion case, reference to which is necessary to ascertain the grounds of the judgment, is reported as *McClelland v. State of Texas*, 373 S.W.2d 674. Copy of this Opinion is attached as Appendix "B" (Pages 34 to 64).

The judgment of the trial court which was affirmed by the Court of Criminal Appeals is attached as Appendix "C" (Pages 65 to 66).

GROUNDS OF JURISDICTION

The judgment and decree sought to be reviewed was handed down and entered by the Texas Court of Criminal Appeals on March 10, 1965. First and Second Motions for Rehearing were timely filed and were finally overruled on June 9, 1965, on which date the judgment became final. The Mandate issued on June 11, 1965. These facts are confirmed by certificate of the Clerk of the Court of Criminal Appeals, attached as Appendix "D" (Page 67).

Jurisdiction of the Supreme Court of the United States of America is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

After a grand jury had entered upon an investigation of Petitioner, the prosecuting attorney, prior to the indictment, purposefully and intentionally instituted and conducted a televised public examination of the grand jury witnesses and Petitioner. Though Petitioner bore the status of an accused in the proceedings, he was expressly denied the right to defend, the right to be repre-

sented by his retained counsel, the right to cross-examine, the right of confrontation, the right to contradict and rebut. These proceedings were conducted over Petitioner's repeated objections and claims of Constitutional prohibitions. The questions presented are:

I. Whether by these proceedings Petitioner was denied due process of law as guaranteed to him by Amendments V and XIV of the Constitution of the United States.

II. Whether by these proceedings Petitioner was denied the equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States.

III. Whether these proceedings show a denial to Petitioner of traditional grand jury procedures within the concept of the right to indictment of a grand jury as guaranteed to him by Amendment V to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Texas.

IV. Whether the traditional rule prescribing secrecy of grand jury proceedings has as one of its purposes the protection of the accused against pre-indictment public examination of the grand jury witnesses in a proceeding in which the accused is denied the right to defend, to be represented by counsel, to cross-examine, to compulsory process, or to rebut.

V. Whether these proceedings are prohibited by the rule of *Estes v. Texas*, ____ U.S. ____, 85 S.Ct. 1628.

VI. Whether the Federal standard for grand jury procedures for protection of an accused applies to a state whose Constitution guarantees the protection of indictment by a grand jury.

VII. Whether these procedures show a use by the prosecution of the inquisitorial system of criminal justice.

VIII. Whether in a Court of Inquiry under *Vernon's Tex. Code of Cr. Proc.*, Arts 886 when the proceedings are publicly conducted and televised on the instigation of the prosecuting attorney, a person having the status of an accused is entitled under the Constitution of the United States to defend, to be represented by counsel, to cross-examine, to confrontation, to compulsory process, and to contradict and rebut.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor be deprived of life, liberty or property, without due process of law."

Amendment VI to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause

> of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Sec. 1, to the *Constitution of the United States,* the pertinent provisions of which provide as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiciton the equal protection of the laws."

Art. I, Section 10 of the *Constitution of the State of Texas* which provides as follows:

> "In all criminal prosecutions the accused shall have a speedy trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, * * * and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. As amended November 5, 1918."

Vernon's Texas Code of Criminal Procedure, Art. 886, which provides as follows:

> "When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint has been made and filed."

Vernon's Texas Code of Crim. Pro., Art. 887, which provides as follows:

> "Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement."

STATEMENT OF THE CASE

This Petition is analogous to Petition No. 345, October Term, 1965. There are two factual distinctions: (1) The indictment here was by a successor grand jury. (2) The trial court allowed proof on the motion to quash the indictment.

The Federal questions were raised in the Court of first instance by Petitioner's Motion to Quash the Indictment. (Tr. 4-20) and by Petitioner's Amended Motion for New Trial (Tr. 73-78). They were raised in the Court of Criminal Appeals by filing with the Clerk of said court a transcript containing the Motion to Quash and the Amended Motion for New Trial and a record of the Hearing on

Defendant's Motion to Quash the Indictment, and by exhaustive briefs on the points, followed by two Motions for Rehearing.

Petitioner's Motion to Quash, attached hereto as Appendix "E" (Pages 68 to 85), alleged that all Anglo-American concepts of traditional grand jury procedures were violated by televised public examination of the grand jury witnesses, and the Petitioner, in a public proceeding, in which Petitioner, though bearing the status of an accused, was expressly denied the assistance of his counsel and the right in any way to defend, including denials of the rights to cross-examine, to rebut, to confront the state's witnesses, and to confer with his counsel, before answering specific questions. The allegations are summarized as follows:

In May of 1962 Petitioner was duly qualified Judge of the Probate Court of Harris County, Texas. On May 7, 1962, the Grand Jury of Harris County, Texas, was duly impanelled, and during the month of May, 1962, in its usual and customary secret proceedings, began investigating the Petitioner and his conducting of the affairs of the Probate Court of Harris County, Texas. By June 1, 1962, the Grand Jury had not brought an indictment against Petitioner.

On June 5, 1962, the District Attorney of Harris County, Texas, Mr. Frank Briscoe, in cooperation with a Justice of the Peace, W. C. Ragan, obtained an order for a so-called "Court of Inquiry" from the said Ragan for public examination of the grand jury witnesses and Petitioner without the right of Petitioner to the assistance of his counsel or to defend. Thereupon the lawful and cus-

tomary and traditional secret deliberations of the Grand Jury were postponed and delayed while the District Attorney pursued the "Court of Inquiry" in public before the said Justice of the Peace. The Petitioner expressly objected at every stage and through every lawful means to these unprecedented procedures, but over Petitioner's express objections the "Court of Inquiry" was held on June 14, 15, 16 and 18, 1962.

The "Court of Inquiry" was publicly conducted with all of the news media present and with the proceedings being broadcast by television and radio from the Courtroom. During the "Court of Inquiry" proceedings all of the State's witnesses against the Petitioner were publicly examined. During the "Court of Inquiry" proceedings the Petitioner himself, over his objections, was publicly examined.

Notwithstanding Petitioner bore the status of an accused in the proceedings and he and the grand jury witnesses against him were being publicly examined, before television cameras and radio recorders, Petitioner was expressly denied the right to defend and the assistance of his retained counsel in the proceedings. He was also expressly denied the right to confront the witnesses against him, the right to cross-examine the witnesses against him, the right to call witnesses in his own behalf, and the right to rebut and contradict the evidence produced by the prosecution.

Thereafter, the Grand Jury bringing this indictment was ultimately impanelled and returned this indictment against Petitioner for a felony offense without the testimony of witnesses.

The Texas Constitution, Article I, Section 10, guarantees that felony offenses shall be prosecuted only on indictment by a grand jury.

The Motion to Quash further alleged that the unlawful procedures pursued denied Petitioner due process of law, the equal protection of the law, the right of Assistance of Counsel, the right of confrontation, the right of compulsory process for defense, and the right to specification of charges, all as guaranteed to him by Amendments V, VI and XIV to the Constitution of the United States. It additionally alleged that the procedures abridged his privileges and immunities as a citizen of the United States in violation of Amendment XIV to the Constitution of the United States.

On the hearing on the Motion to Quash the Indictment the following was proved in support of the allegations:[1]

The District Attorney of Harris County, Texas, on June 5, 1962, petitioned Justice of the Peace, W. C. Ragan, to call and conduct the Court of Inquiry and from him obtained an order for it to be convened on June 14, 1962, "to inquire into the processing of various estates by the Probate Court of Harris County, Texas." He alleged that he had "good cause to believe that offenses had been committed against the laws of this State." (R. 3, 88, Def. Ex. 6).

When the Court of Inquiry was called and when it was conducted the Harris County Grand Jury was already

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[1] The following page and exhibit references are to the record on the Hearing on Defendant's Motion to Quash the Indictment, which Texas law requires to be filed with the Court of Criminal Appeals in a volume separate from the record on the trial on the merits. **Vernon's Tex. Code of Crim. Pro.**, Art. 759a, Sec. 6.

duly impanelled, organized and available, for the County has continuous term grand juries (R. 4-5). Before the Court of Inquiry was convened the grand jury had itself entered upon the investigation by calling and questioning two witnesses (R. 7-8).

That the Court of Inquiry was requested and called with publicity as a considered objective is evidenced by the testimony of the Justice of the Peace:

"Q. And you do know, do you not, that the various reporters from the various newspapers were there and reporting the proceedings?

A. Mr. Smith, I don't know what the newspapers were doing, because that was one of the stipulations. If I held that Court of Inquiry, the District Attorney was to take care of the reporters and the information given them.

* * *

Q. And so, you and Mr. Briscoe had that understanding prior to the ordering of the Court of Inquiry?

A. We had that understanding that I didn't want any of the newspaper reporters after me for information.

Q. All right. And the District Attorney was to attend to all of the publicty?

A. He certainly was; and did."

During the Court of Inquiry the State's witnesses were publicly examined before television cameras and radio recording devices set up in the courtroom, with the result that the proceedings were broadcast from television and radio stations. (R. 10-12, 92-95). There was additional massive publicity by the metropolitan newspapers of Houston, Texas, the Houston Post, the Houston Chronicle and

the Houston Press. Some of the reporting was in detailed, question and answer form. For full detailed nature of the newspaper coverage see the folders containing the various stories in Defendant's Exhibits 3, 4 and 5.

The Court of Inquiry was in session June 14, 15, 16 and 18. Throughout the proceedings, seventeen witnesses, including Petitioner, were examined. Transcript of the proceedings consist of two volumes containing 634 pages (Defendant's Exhibits 1 and 2).

Petitioner was expressly denied the right to be represented by counsel as in an ordinary court proceeding. (R. 32). He was repeatedly denied the right to cross examine any of the witnesses (R. 33, 96) and to bring any witnesses in rebuttal. (R. 33-34, 36, 99). When questions were put to Petitioner he was not allowed to consult counsel before answering. (R. 34-35). When not on the witness stand, Petitioner was required to remain outside the courtroom. (R. 97).

It was established by Mr. Frank Briscoe, the District Attorney of Harris County, Texas, that the described proceedings were not standard procedures for felony prosecutions. During his administration there had been approximately four to five hundred felony indictments per month in Harris County, totaling fourteen thousand for his term of office. (R. 16). Prior thereto the average was two hundred per month (R. 20). To his memory and knowledge of the history of the County, he first testified that the Court of Inquiry procedures had never before been used for offenses of the grade of felony where an indictment had followed (R. 19), though on two other occasions they had been used for misdemeanor matters

involving sale of pistols and obscene literature (R. 18-19). On cross-examination he recalled one possible prior exception (R. 31).

The present indictment was brought without the grand jury's hearing any witnesses. (R. 24, 25). All but two of the grand jurors were informed of the information produced by the Court of Inquiry by the various news media that reported or broadcast the proceedings (R. 55, 62, 64, 68, 70, 72, 78-79, 81, 84, 86).

The Court of Criminal Appeals disposed of the Federal issues by the following statement in its opinion of affirmance:

> "We have carefully examined Appellant's remaining contentions. We think it unnecessary to unduly lengthen this opinion by writing further on any of these matters. We have previously expressed the views of this Court and fully answered some of these same contentions in our prior opinion in McClelland v. State, Tex.Cr.App., 373 S.W.2d 674. The other contentions do not, in our opinion, merit discussion." (See Appendix "A" at p. 32).

On Motion for Rehearing, the Court made the following additional statements:

> "The contention urged by appellant that the Court erred in refusing to quash the indictment because of the public examination of state's witnesses in a court of inquiry prior to the return of the indictment was overruled in McClelland v. State, supra, cited in our original opinion, where it was held that such was not a ground for quashing an indictment in this state.
>
> "We have again examined the authorities and adhere to such ruling.

"In State v. Branch, 68 N.C. 186, cited by appellant, the witnesses upon whose testimony the indictment was presented were examined before the grand jury in open court.

"No such procedure or facts are presented in the case before us." (See Appendix "A" at p. 34).

REASONS FOR GRANTING THE WRIT

I.

The allegations and Proof of Petitioner's Motion to Quash describe procedures of serious import to the due administration of criminal justice. By these procedures a prosecuting attorney circumvents the protections inherent in the Constitutional guarantees of indictment by grand jury (guaranteed by Amendment V of the Constitution of the United States and Article I, Section 10 of the Texas Constitution), and in practical effect convicts the Defendant, before he is indicted (or otherwise formally charged), in a proceeding in which he is expressly denied the right to defend. It functions thus:

(1) The prosecutor brings about a recess of the grand jury and calls a "Court of Inquiry" with the cooperation of a Justice of the Peace.

(2) The prosecutor conducts the "Court of Inquiry" in public with all the news media present and with the proceedings being broadcast by television and radio. The grand jury witnesses, and the defendant, are publicly examined before the television cameras and the radio recorders.

(3) In these proceedings defendant is expressly denied representation by counsel, the right to in any way

defend, the right to cross-examine, the right to rebut, and the right of confrontation.

(4) Thereafter the grand jury is reconvened, whereupon defendant is indicted, and then brought to formal trial.

After such procedures were pursued Petitioner's formal trial was a mockery for his conviction was already assured. There was little his counsel could do for him then. See *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417; *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 and the dissent of Mr. Justice Black in *In re: Groban*, 352 U.S. 330, 337, 77 S.Ct. 510, 515, approved in *Escobedo*, supra.

The wide spread pre-trial publicity by television, radio and newspaper destroyed all opportunity for Petitioner to obtain a fair trial. See *Estes v. Texas*, ___U.S.___, 85 S.Ct. 1628, and *The Warren Commission Report on the Assassination of President John F. Kennedy* (Complete Doubleday Edition, Pages 12 and 231-242). In this connection, it should be noted that the publicity is alleged to have been instigated by the prosecuting attorney and not the result of the private enterprise of the news media. See *Delaney v. United States* (1st Cir. 1952), 199 F.2d 107.

II.

The public examination of the grand jury witnesses and the Petitioner, without Petitioner's having the right to assistance of counsel and the rights to cross-examine, rebut, and defend is violative of all Anglo-American concepts of grand jury procedures. Counsel for Petitioner have found only two other cases where this factual situa-

tion was presented. *Shaftesbury's* Case (Bill of Indictment Against Anthony, Earl of Shaftesbury) State Trials, 33 Charles II (1681) (in which the grand jury refused to indict because the procedures were contrary to tradition), and *State v. Branch,* 68 N. Car. 186 (2d Ed. 68 N. Car. 133) (in which the indictment was quashed because of the procedures).

In *State v. Branch,* supra, the Grand Jury had first considered the evidence and refused to indict. Thereupon the trial court ordered the witness examined in public. Thereafter the Grand Jury again deliberated and brought in the indictment. On appeal the Supreme Court of North Carolina quashed the indictment decreeing as follows:

> "There is nothing in our law books, and no tradition of the profession to show that such has ever been the practice or the course of the courts in this State; and *we are of opinion that the ruling of His Honor is an innovation not warranted by the law of the land.*
>
> "The power of the Judge to require a grand jury to come into open court and have the witnesses for the State examined, *is not only opposed to immemorial usage, but is not sustained either by principle or by authority.*
>
> * * *
>
> "How does this innovation upon ancient usage comport with this clause of the Declaration of Rights? It defeats it in toto. If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's Solicitor; *for the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State,* in order to see whether he

ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and, *if upon the public examination of the witnesses for the State, he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defense,' instead of being, in the first place, put in the condition of a victim tied to "a stake", while his reputation is being tortured to death. If the witnesses for the State are to be examined in public, upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit of counsel.*

* * *

"There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever 'in force and in use in the colony of North Carolina'; very certainly, such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republican government. *Why examine the witness for the State in public, without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the grand jury and influence 'the finding', not in respect to the case but in respect to the fact?*" (Emphasis added).

Shaftesbury's Case, supra, is the basic, ancient authority for the Anglo-American tradition of pre-trial examination of the grand jury in secret. There, during the religious struggles, King Charles, his justices and the King's counsel, contrary to all precedent then existing, forced the public

examination of the witnesses against Shaftesbury without his having the right to defend or challenge the witnesses. Because the Grand Jury was forced into this procedure that violated traditions ancient even then, it refused to indict and endorsed the Bill "*Ignoramus*" ("We ignore it" *Black's Law Dictionary*). The struggles on the issues apropos to the present petition are well illustrated by the following excerpts from the colloquys between Lord Chief Justice Pemberton, the Foreman of the Grand Jury, and a member named Papillon:

> "L. C. J. Gentlemen of the jury, you hear *it is desired by the king's counsel* (and that we cannot deny) *that the evidence may be publicly given*, that it may not be hereafter in the mouths of any ill minded persons abroad, to scatter any mistakes or untruths up and down; or to slander the king's evidence, or to say anything concerning them that is not true.
>
> * * *
>
> "Foreman. My Lord Chief Justice, *it is the opinion of the jury, that they ought to examine the witness in private, and it hath been the constant practice of our ancestors and predecessors to do it;* and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do, if it be done in court."
>
> * * *
>
> "Foreman. My Lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in any thing, it is contrary to the sence of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret . . ."

"Mr. Papillon. Your lordship is pleased to say, that it hath been the common usage and practice; sometimes, *my lord, we have heard that that hath been the law of England, that hath never been altered from time to time,* and hath continued so, we desire your lordship's opinion upon that; as we would not do any that may be prejudicial to the king, *so we would not do the least that should be prejudicial to the liberties of the people . . .*"

"* * * Then besides, the jury do apprehend that in private they are more free to examine things in particular, for the satisfying their own conscience, and that without favour or affection; and we hope we shall do our duty."

"L. C. J. Look you, gentlemen, don't talk of this, but consider with yourselves, an examination of proofs concerning the credibility of the witnesses is not properly before you at this time."

* * *

"Mr. Papillon. *If we are not left to consider the credibility of the witnesses, we can not satisfy our consciences.*"

* * *

"L. C. J. *The Grand Jury are to hear nothings, but the evidence against the prisoner;* therefore for you to enter into proofs, or expect any here, concerning the credit of the witnesses, it is impossible for you to do justice at that rate."

* * *

"The jury withdrew to consider the evidence, and returned the bill *Ignoramus* ("We ignore it" *Black's Law Dictionary*), *upon which the people fell a hollowing and shouting.*

"Att. Gen. My lord, let it be recorded this hollowing and hooping in a court of justice." (Emphasis added)

III.

The Federal Courts place great sanctity on the protection of the citizen by the guarantee of indictment by grand jury. *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038; *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270; *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781. It is therefore respectfully suggested that no Federal Court in a Federal Grand Jury proceeding would sanction as lawful those procedures Petitioner shows were used against him by the State of Texas.

Texas guarantees to its citizens the protection of indictment by grand jury, *Texas Constitution, Art.* I. *Sec.* 10. Having adopted such a protection it should be bound to apply the high Federal standard that would prevent such procedures as are shown by Petitioner's Motion to Quash. Authority for its being so bound is found in *Griffin v. California,* ____ U.S. ____, 85 S.Ct. 1229. (Applying the Federal test against the State of California on commenting on the failure of a Defendant to testify). *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489 (Applying the Federal test against the State of Connecticut on self-incriminating tendency of an answer justifying refusal to answer); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (Applying the Federal test against the State of Texas as to the standard for obtaining a search warrant); *Pointer v. Texas,* ____ U.S. ____, 85 S.Ct. 1065 (Applying the Federal test against the State of Texas as to the right of confrontation); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792 (Applying the Federal test against the State of Florida on the right of an indigent Defendant to appointment of counsel for his defense); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (Applying the Federal test against the

State of Ohio of the inadmisibility of evidence obtained by an unreasonable search and seizure); *Stanford v. Texas* (No. 40 October Term, 1964) ____ U.S. ____, 85 S.Ct. 507 (Applying against the State of Texas the Federal test as to the sufficiency of the identification of "things to be seized" under a search warrant and prohibiting the issuance of a General Warrant).

By these recent decisions this Court has now taken the position that the Fifth and Sixth Amendments to the Constitution of the United States are obligatory on the States. The protection of indictment by a grand jury guaranteed in the Fifth Amendment is therefore binding on the State of Texas. Included in this protection is the fundamental tradition that the grand jury witnesses shall be examined in private that a defendant may not be pre-judged by the public before he has opportunity to defend. See *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, which decrees that a State cannot adopt a procedure that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

IV.

The procedures shown by Petitioner on his Motion to Quash are atavistic, a throwback to the inquisitions "when the Star Chamber and the Court of High Commissions cast their baneful shadow over every English Home." See *In re: Funston*, 233 N.Y.S. 81; *In re: Gardiner*, 64 N.Y.S. 760, and *People v. Naughton*, 7 Abb. Prac. N.S. 421. They are analogous to Soviet procedures where the formal trial is but an appeal from the pre-trial investigation. See Foot Note 9 to *Escobedo v. Illinois*, 37 U.S. 478, 84 S.Ct. 1758, 1763.

To examine the prosecution witnesses in public before television cameras and radio recorders without the Petitioner having the right to counsel and the right to defend is to use inquisitorial system of criminal justice. But the States are forbidden by the Fifth and Fourteenth Amendments to adopt or use the inquisitorial process. *Malloy v. Hogan,* 378 U.S. 1, 7, 84 S.Ct. 1489, 1493 ("The marked shift to the Federal standard in State cases began with *Lisenba v. California,* 314 U.S. 219, 62 S.Ct. 280 * * * The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * The Respondent sheriff concedes in its brief that under our decisions * * * the accusatorial system has become a fundamental part of the fabric of our society, and hence, is enforcible against the States".) *Rogers v. Richmond,* 365 U.S. 534, 541, 81 S.Ct. 735, 739 ("An underlying principle in the enforcement of our criminal law" [is] that ours is an accusatorial system and not an inquisitorial system.") See also *Griffin v. California,* ____ U.S. ____, 85 S.Ct. 1229; *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 84 S.Ct. 1594, and *Escobedo v. Illinois,* supra.

V.

The proof on the Motion to Quash shows that with one possible exception the unusual procedures had not before been used in Harris County, Texas, in felony prosecutions. During the administration of the present District Attorney there had been approximately fourteen thousand felony indictments. Out of that fourteen thousand felony prosecutions, this was the only time the procedures had been

followed for felony offenses. To use these procedures against Petitioner was to deny to him the equal protection of the law. Equality of procedures without invidious discrimination is a part of the equal protection clause. *Chambers v. Florida,* 309 U.S. 227, 60 S.Ct. 472; *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585. In the Griffin Case this Court decreed:

> "Providing equal justice for poor and rich, weak, and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' "

By the abnormal procedures Petitioner was in practical effect publicly tried and convicted in a proceeding in which he was affirmatively denied the fundamental right to defend.

CONCLUSION AND PRAYER

On the facts and authorities presented the reasons for granting the Writ of Certiorari may be summarized as follows:

(1) The procedures used against Petitioner, if allowed to become precedent, would enable a prosecuting attorney to circumvent the protections inherent in the guarantee of indictment by grand jury.

(2) The procedures used against Petitioner, if allowed to become precedent, would set the pattern for an inquisitorial system of criminal prosecution in which the defendant in practical effect would be tried and convicted without the opportunity to defend.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court of the United States grant the Writ of Certiorari to correct the errors of the Honorable Court of Criminal Appeals of the State of Texas and of the trial court whose actions it affirmed.

Respectfully submitted,

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APPENDIX "A"

CLEM McCLELLAND, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 37833.

Court of Criminal Appeal of Texas.
March 10, 1965.

Rehearing Denied May 5, 1965.

Second Motion for Rehearing Denied
June 9, 1965.

Smith & Lehmann, by J. Edwin Smith, Houston, Reagan & Welch, by Jack Welch, Marlin, Dixie & Schulman, Jack J. Rawitscher, Houston, for appellant.

Frank Briscoe, Dist. Atty., Samuel H. Robertson, Jr., Carl E. F. Dally, Gus J. Zgourides, Asst. Dist. Attys., Houston, Thomas Bartlett, Jr., County Atty., Marlin, and Leon B. Douglas, State's Atty., Austin, for the State.

McDONALD, Presiding Judge.

The conviction is for the offense of accepting a bribe; the punishment, five years' confinement in the state penitentiary and a fine of $5,000.00.

The appellant was indicted for the offense of accepting a bribe from James Bryson Martin, Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren. It was alleged that the bribe accepted by the appellant was made to him by the five named persons to secure their appointment as appraisers, administrators, and guardians in probate proceedings in the Probate Court, of which the appellant was then Judge.

The appellant's motion for change of venue from Harris County was granted, and the case was tried in Falls County.

This is an appeal from appellant's trial and conviction in Falls County.

The state's testimony reflected that the appellant, Clem McClelland, was at the time alleged the duly elected and acting Probate Judge of Harris County, Texas. As Probate Judge, he was required by the Probate Code of the State of Texas to appoint appraisers, administrators and guardians in the cases filed in the Probate Court.

The state adduced evidence showing that James Bryson Martin, one of the parties involved in giving the bribe to the appellant, and two other persons acting as incorporators, obtained on December 2, 1960, Articles of Incorporation from the Secretary of State of the State of Texas, authorizing the corporation to do business under the name of Tierra Grande, Inc. It was shown that the other two parties were friends and former business associates of Martin, but that they had no financial or other interest in Tierra Grande, Inc. One of the parties merely accommodated the appellant by acting as an incorporator. The other party admitted her signature was genuine upon the Articles of Incorporation, but did not know when or under what circumstances it had been signed.

The evidence adduced by the state further showed that on December 2, 1960, a bank account for Tierra Grande, Inc., was opened in the Citizens State Bank in Houston, Texas. During that month, and every succeeding month until May, 1962, E. R. Coffey, R. M. Duren, Ross Evahn, David Hudson, and James Bryson Martin made frequent,

unequal deposits into the account of Tierra Grande, Inc. Other than the deposits made by these individuals, there was only one other deposit in the amount of $5.000.00 made into the account. The deposits into the account were shown by voluminous bank records kept in the regular course of business of the Citizens State Bank, in which the Tierra Grande account was located. David Hudson and E. R. Coffey maintained bank accounts in the same bank, and from the records of their accounts it was shown that Hudson had deposited into the Tierra Grande account the total amount of $4,750.00, and E. R. Coffey had deposited the total amount of $3,666.10. Deposits totaling $7,975.00, shown to have come from his account in the Texas National Bank, were made by R. M. Duren. Deposits in the amount of $6,775.00, shown to have come from his account in the National Bank of Commerce, were made by Ross Evahn. Deposits made to the Tierra Grande, Inc., account by James Bryson Martin, totaling $558.00, were shown to have come from his account in the Bank of Texas. All of these banks were located in downtown Houston.

It was reflected from the state's testimony that the only two persons authorized to make withdrawals from the Tierra Grande, Inc., account were James Bryson Martin and Helen Smith. Helen Smith, who signed most of the checks, was and had been for a number of years the appellant's secretary.

From testimony adduced by the state, it was shown through the bank records kept in the regular course of business of the Citizens State Bank, that virtually all of the money which had been deposited into the Tierra Grande, Inc., bank account had been withdrawn sys-

tematically every month for the benefit of the appellant. The money was used to pay his club bills, parking garage fees, payment on automobiles, to send his son to camp, to pay gasoline bills, and a large part was paid to the appellant or to his wife directly. The records kept in the regular course of business of the Bank of the Southwest, where appellant maintained bank accounts, revealed that the checks drawn on Tierra Grande, Inc., payable to him or his wife, had been endorsed by them and deposited into their private accounts.

State's evidence adduced further showed that from January 1, 1961, to May, 1962, Judge McClelland had appointed James Bryson Martin, Ross Evahn, David Hudson, E. R. Coffey, and R. M. Duren as appraisers in estates for a total of 3511 times. In this same period of time, the appellant had appointed as appraisers 257 other persons, and they had acted a total of 2,225 times. This evidence was obtained from the public records of the Probate Court.

The evidence further revealed that each appraiser in each estate received a fee of $5.00 which was charged to the court costs and paid to him through the Court all during the time up to January, 1962, when this practice was discontinued. From a random sampling of the estates, it was shown that additional appraisal fees in substantial amounts were received by the five named appraisers, James Bryson Martin, E. R. Coffey, R. M. Duren, David Hudson, and Ross Evahn.

The appellant did not testify as a witness in his own behalf. He did introduce certain evidence showing that the various appraisers had received a large number of appointments before the formation of Tierra Grande, Inc.

The indictment, omitting the formal parts, charged:

> "* * * that on or about the 2nd day of December, A.D. 1960, in said County and State, that Clem McClelland was then and there Judge of the Probate Court of Harris County, Texas, a judicial officer, the said Clem McClelland having been duly elected and qualified as such officer and having entered upon the duties of said office, a part of said duties being the appointment of appraisers, administrators and guardians in matters, causes, and proceedings filed in the Probate Court; and the said Clem McClelland did then and there unlawfully, wilfully, and corruptly accept a bribe from Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, and James Bryson Martin in that he did accept Twenty-Five Thousand Seven Hundred Eighty-Three Dollars and Ten Cents ($25,783.10) in money, and did then and there accept the same from the said Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, and James Bryson Martin under an agreement with the said Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, and James Bryson Martin with the understanding that his acts, decisions, judgments, and recommendations would be influenced thereby in his judicial capacity to thereafter appoint them, the said Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, and James Bryson Martin as appraisers, administrators, and guardians in matters, causes, and proceedings then pending before the said Clem McClelland in his judicial capacity, and in matters, causes, and proceedings which would thereafter be brought before and come before the said Clem McClelland in his judicial capacity in violation of his duty as said officer."

[1,2] We think the evidence presented by this record conclusively shows that the five named persons, James

Bryson Martin, David Hudson, E. R. Coffey, Ross Evahn, and R. M Duren, each had an agreement with appellant and bribed him for the benefit of themselves with the understanding that his (appellant's) acts, decisions, judgments and recommendations would be influenced thereby in his judicial capacity to thereafter appoint them, as was done, as appraisers, administrators and guardians in causes then pending and in causes thereafter to be brought before appellant in his judicial capacity. The "dummy corporation", Tierra Grande, Inc., might be termed the "collector". This corporation took or collected the money from the five men, and it was in turn received and collected by appellant. The money went into a common pool, Tierra Grande, Inc. The money, of course, lost its identity or common source when it was deposited so that it would have been impossible to determine how much of each of the five men's deposits went to appellant at a given time. It is entirely possible that appellant made a separate and distinct arrangement with each of these five individuals. It is immaterial whether one of the five knew what the other four were doing or not. It is also immaterial whether each man had the same arrangement with appellant or not. One of them might have been paying in, or depositing only 5% of his fee to Tierra Grande, Inc., whereas, another might have been paying in 20% and other three 25%. All five men are under the terms of the indictment as "bribers". As we view the charge, when appellant agreed with one or more of these five to accept a bribe, to take something of value to influence his judgment, and he then did so, the offense was complete. The various payments that were made via Tierra Grande, Inc. were actually installments upon the existing agreement and in fulfillment of the nefarious bribery contract and were things done

in furtherance of the operation agreement. The various acts and transactions of each of the five were admissible to show their scheme and design and agreement with appellant and their understanding with him, as well as being admissible to show the completion of the bribery act by them. We are not here dealing with extraneous offenses, but we are dealing with one offense involving many transactions.

We find the evidence abundantly sufficient to support the jury's verdict.

[3,4] Appellant brings forward numerous contentions in his brief. Among them, he contends that the trial court erred in not sustaining his motion to quash the indictment. It is his position that the indictment is both insufficient to advise him of the nature and cause of the accusation against him and that it is duplicitous in that it charges more than one offense in the same count. While the order of the Court overruling appellant's motion to quash does not show an exception by appellant to the court's ruling, as required by Art. 760e, Vernon's Ann.C.C.P., to constitute an informal bill of exception under such article, Brooks v. State, 170 Tex.Cr.R. 555, 342 S.W.2d 439, we have nevertheless examined the indictment in the light of appellant's objections thereto. As we stated in our opinion in Martin v. State, ____ S.W.2d ____, delivered January 6, 1965, the indictment follows the statute, and the allegations are sufficient to charge the offense of bribery under Art. 158, V.A.P.C.

[5] Appellant's contention that the trial court erred in refusing to require the state to have elected upon which transaction they would rely for a conviction has already been answered by us. No election was necessary.

[6] Complaint is made of the failure of the Court to charge on the law of principals. While it is true that such a charge was given in Martin v. State, supra, it should be remembered that Martin was charged as one of five men who had bribed one judge (this appellant). Such is not the case here because appellant is charged singularly with accepting bribes from five different men to perform a similar act for each of them and receive his reward through one common source. In such a case no charge on principals is required.

We have carefully examined appellant's remaining contentions. We think it unnecessary to unduly lengthen this opinion by writing further on any of these matters. We have previously expressed the views of this Court and fully answered some of these same contentions in our prior opinion in McClelland v. State, Tex.Cr.App., 373 S.W.2d 674. The other contentions do not, in our opinion, merit discussion.

Finding no reversible error, the judgment is affirmed.

ON APPELLANT'S MOTION FOR REHEARING

DICE, Commissioner.

Appellant insists that we were in error in our holding that an election was not required under the facts and construes certain language in our opinion—when we stated: "It is entirely possible that appellant made a separate and distinct arrangement with each of the five individuals. * * * As we view the charge, when appellant agreed with one or more of the five to accept a bribe, to take something of value to influence his judgment, and he then did so, the offense was complete."—as holding that separate

offenses of bribery were committed when payments were made by the five individuals named in the indictment.

By such language it was not our intention to hold that five separate offenses were committed, as we specifically pointed out that:

> "We are not here dealing with extraneous offenses, but we are dealing with one offense involving many transactions."

The fact that R. M. Duren had been appointed administrator of the Hogan estate three years prior to the presentment of the indictment did not make the evidence of his receipt of $2,500 as an administrator's fee in the estate and the deposit of one-third of such amount into the Tierra Grande account proof of an extraneous offense. Such payment and deposit could have been for appointments and fees in other estates, made after the offer to bribe was accepted by appellant.

Appellant also insists that we were in error in concluding that a charge on the law of principals was not required, and insists that the question is not whether he and the five individuals named in the indictment were principals but whether the five were acting together with each other as principals in the crime. It is argued that a charge on principals should have been given as to the five individuals so that the jury's consideration of the evidence of their acts and conduct could have been limited to the acts of those who the jury found were acting together as principals in the bribery of appellant.

By the very nature of the offense, the five individuals named in the indictment could not be principals in the

acceptance of the bribe by appellant which they themselves were offering and paying.

The contention urged by appellant that the court erred in refusing to quash the indictment because of the public examination of state's witnesses in a court of inquiry prior to the return of the indictment was overruled in McClelland v. State, supra, cited in our original opinion, where it was held that such was not a ground for quashing an indictment in this state.

We have again examined the authorities, and adhere to such ruling.

In State v. Branch, 68 N.C. 186, cited by appellant, the witnesses upon whose testimony the indictment was presented were examined before the grand jury in open court.

No such procedure or facts are presented in the case before us.

The motion for rehearing is overruled.

Opinion approved by the court.

APPENDIX "B"

CLEM McCLELAND, Appellant

v.

THE STATE OF TEXAS, Appellee

No. 35837

Court of Criminal Appeals of Texas

June 29, 1963

On Rehearing Dec. 11, 1963

Second Rehearing Denied Jan. 15, 1964

J. Edwin Smith, Jack Rawitscher, Smith & Lehmann, Houston, Skelton, Bowmer & Courtney, Byron Skelton, Jim D. Bowmer and Bob Burleson, Temple, for appellant.

Frank Briscoe, Dist. Atty., Houston, Samuel H. Robertson, Jr., Carl E. F. Dally and Gus Zgourides, Asst. Dist. Attys., Houston, and Leon B. Douglas, State's Atty., Austin, for the State.

DICE, Commissioner.

The conviction is under Art. 1538, Vernon's Ann.P.C., for conversion of an estate; the punishment, ten years.

Trial was in the 27th Judicial District Court of Bell County upon a change of venue from Harris County.

The indictment returned into Criminal District Court No. 5 of Harris County, omitting the formal parts, charged that:

> "* * * on or about the 19th day of December, A.D. 1960, in said County and State, RICHARD H. PUT-

NEY was the administrator of the estate of Clara L. Currie, deceased, and as such had in his charge the estate, real, personal and mixed, of the said Clara L. Currie, and the said RICHARD H. PUTNEY and CLEM McCLELLAND, acting together as principals, did then and there unlawfully and with intent to defraud the heirs and distributees interested in such estate (the said heirs and distributees being to the Grand Jurors unknown), convert to their own use a part of the property of said estate, to-wit: ten thousand dollars in money, the same being then and there of the value of ten thousand dollars."

Upon the granting of a severance, appellant, Clem McClelland, was, by order of the court, tried first.

The state's proof shows that appellant was the duly elected, qualified, and acting Judge of the Probate Court of Harris County, Texas.

On September 10, 1960, Mrs. Clara L. Currie died intestate, in Harris County, leaving an estate consisting of both real and personal property of the appraised value of approximately $160,000.

On September 16, 1960, Richard H. Putney, appellant's co-indictee and a practicing attorney in the city of Houston, was appointed temporary administrator of Mrs. Currie's estate. His bond in the sum of $25,000 was approved by appellant.

On October 11, 1960, the administration was by appellant's order made permanent and the administrator's bond fixed at $5,000. On October 17, the said Richard H. Putney qualified as administrator of the estate by taking the oath and executing a bond that was approved by appellant in his official capacity.

Upon the trial, Putney was called as a witness by the state.

He testified that on December 19, 1960, he went to appellant's office and presented to him an application and order which he had prepared for a fee to be paid to him as administrator of the estate. Appellant, at such time, according to the witness, acted upon the application by inserting in the space left blank in the order for the amount of the fee the figure $10,000, stating that it was an unusual case and he (Putney) would need assistance with it. He further testified that appellant stated to him that the fee would be divided between them, "an even split," and instructed him to deposit his share to the account of Tierra Grande, Inc., in the Citizens State Bank, of Houston. The witness stated that he proceeded directly from appellant's office to the Citizens State Bank, where he drew a check on the Currie estate for $10,000, of which he deposited $9,500 to his personal account and retained $500 in cash. He related that he then wrote a check for $5,000 on his personal account, which he deposited in the bank to the account of Tierra Grande, Inc., and that he took a duplicate deposit slip for the $5,000 deposit to appellant's office, at which time he did not see him but left the deposit slip on his (appellant's) desk. The witness stated that he furnished appellant with a copy of the application and order for the attorney's fee and that the last time he saw the papers they were on appellant's desk. He also stated that he had no intention of investing in Tierra Grande, Inc., at the time of making the $5,000 deposit and that months later, in June, 1962, he received two stock certificates for 2,500 shares, each, in the corporation, from a man by the name of Bryson Martin.

He further stated that at the time appellant instructed him to deposit his share in the Citizens State Bank he wrote on a slip of paper: "Tierra Grande, Inc., Citizens State Bank." The slip of paper was introduced in evidence and shown by a handwriting expert to be in appellant's handwriting.

Other evidence and testimony were offered by the state to corroborate the testimony of the accomplice witness Putney.

Appellant did not testify or call any witnesses in his behalf.

Appellant insists that if the evidence be sufficient to corroborate the accomplice, it is insufficient to sustain his conviction as a principal, but, viewed from the state's standpoint, shows him to have been an accomplice to the crime.

With this contention, we agree.

Articles 65-69, V.A.P.C., define who are principals in the commission of an offense.

Article 65, supra, provides that

> "All persons are principals who are guilty of acting together in the commission of an offense."

The succeeding Articles 66-69, supra, prescribe the manner in which one may become a principal in the commission of a crime.

The six definitions prescribed by these articles have been set out by this court in the case of Middleton v. State, 86 Tex. Cr.R. 307, 217 S.W. 1046, as follows:

"(1) When A. actually commits the offense, but B. is present, knowing the unlawful intent, and aids by acts or encourages by words.

"(2) When A. actually commits the offense, but B. keeps watch, so as to prevent the interruption of A.

"(3) When A. is actually executing the unlawful act, and B. engages in procuring aid, arms, or means of any kind to assist while A. executes said unlawful act.

"(4) When A. actually commits the offense, but B., at the time of such commission, is endeavoring to secure the safety or concealment of A., or of A. and B.

"(5) When A. employs an innocent agent, or by indirect means causes the injury, or brings about the commission of the offense.

"(6) When A. advises or agrees to the commission of the offense, and is present when the same is committed, whether he aid or not."

Of the six ways in which one may be a principal to a crime, two require his presence at the time the crime is committed, and four make him a principal, though physically absent.

[1] Under the statutory definitions of a principal, whether the person be present or not when a crime is committed he must be actually doing something which associates him with the execution of the unlawful act at the very time it is done, to make him a principal. Schwartz v. State, 158 Tex.Cr.R. 171, 246 S.W.2d 174.

An accomplice is defined in Art. 70 of our Penal Code, as follows:

"An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or

"Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,

"Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or,

"Who prepares arms or aid of any kind, prior to the commission of an offense for the purpose of assisting the principal in the execution of the same."

In the early case of Cook v. State, 14 Tex.App. 96, this court, in setting out the distinction between an accomplice and a principal, said:

"The acts constituting an accomplice are auxiliaries only, all of which may be and are performed by him anterior and as an inducement to the crime about to be committed (Penal Code, Arts. 79 to 85 inclusive); whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished or not."

In 2 Branch's Ann. P.C. 2d Ed., Sec. 710, at page 8, it is stated:

"If the defendant on trial was not present when the offense was committed and was doing nothing in aid of the common design when the offense was com-

mitted, he would not be a principal although the facts support the theory that he was both an accomplice and accessory, or a receiver of stolen property, or either."

In Hankamer v. State, 142 Tex.Cr.R. 23, 150 S.W.2d 794, it was held, in a prosecution under Art. 1538, supra, that *the conversion of funds of an estate was complete the moment the administrator formed the intent to use the money for his private personal use and did so use it.*

The facts in the instant case do not show that appellant was present when Putney withdrew the funds from the estate at the bank. Nor is there any proof that at the time Putney withdrew the funds appellant was doing any act in furtherance of their agreement to take the money from the estate.

Under the facts, appellant was not shown to be a principal to the crime of conversion of the estate but was shown to be merely an accomplice thereto.

[2] In this state, an accomplice cannot legally be convicted of a felony as a principal. See: 2 Branch's P.C., Sec. 710, pages 7-9, and cases there cited.

Parnell v. State, 170 Tex.Cr.R., 30, 339 S.W.2d 49, relied upon by the state, is not here controlling, because, as shown in the opinion in the case, the accused was present at the time of the conversion of funds from the corporation.

Middleton v. State, supra, also relied upon by the state, is not here controlling, because in that case the accused was present at the time of the homicide and doing certain acts in furtherance of the conspiracy to kill the deceased.

By formal Bills of Exception Nos. 9, 10, and 11, appellant complains of the court's refusal, prior to ordering change of venue of the cause, to hear evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, and of the Fifth and Fourteenth Amendments to the Constitution of the United States.

By such refusal, the trial court has deprived this court and the Supreme Court of the United States of the opportunity to review appellant's constitutional claim.

In refusing to permit appellant to submit proof in support of the motions, the court erred. Rothschild v. State, 7 Tex.App. 519, and Juarez v. State, 102 Tex.Cr.R. 297, 277 S.W. 1091.

[3-5] Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should

also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted.

The judgment is reversed and the cause is remanded.

Opinion approved by the court.

MORRISON, Judge (concurring).

It has been suggested that the offense in question was committed when the order allowing the fee was allegedly signed by the judge. This position cannot be sustained because the alleged order does not appear to have been entered in the records of the Probate Court and there is an entire absence of any testimony that it was necessary or that it was ever used to effect the withdrawal of the monies in question; therefore, we cannot base an opinion upon it. Nor can the position be maintained that the money was not appropriated until it found its way into the possession of appellant because this statute could not be violated by appellant who was not a member of a class capable of committing this crime.

While the opinion of this Court may not meet with popular approval, the writer, at least, should not be subject to criticism because I pointed out as early as 1952, in an article which appears in Volume 1 of the Penal Code, that, as I saw it, the Legislature should abolish the distinction between accomplices and principals. More than ten years have passed since such article was published, and the Legislature has not seen fit to change the law.

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, can have no application here because the accused in that case was actively participating in the offense at the time it

occurred, just as was Parnell, and neither case involved conversion of the funds of an estate as we have here and as we had in Hankamer v. State, supra.

Regardless of the charge, the fact remains that in all cases affirmed by this Court holding the accused to be a principal he was actually doing something at the time of the commission of the offense in the furtherance of its commission.

Whether or not the writer is sound in the above conclusions, three other reversible errors appear in this record, as pointed out in Judge Dice's opinion, with which I concur entirely.

WOODLEY, Presiding Judge (dissenting).

The offense charged was not one which the appellant, acting alone, could commit. He stands convicted for having acted together with Putney who was alleged and shown to be the Administrator of the Currie Estate. There was no allegation in the indictment to this effect but the evidence shows that the appellant was the Judge of the Probate Court who appointed Putney as administrator. As Probate Judge he was charged with the responsibility of seeing that Putney performed his duties, and shared with Putney the duty of preserving the property of the estate, that it might be delivered to those lawfully entitled to receive it and to no one else.

The indictment alleged that Putney and the appellant acting together as principals converted to their own use $10,000 in money which was part of the property of the Currie Estate. The court's charge properly instructed the jury to the effect that proof of conversion of $50 or more of the money would be sufficient.

The theory upon which the conclusion is reached that the Judge of the Probate Court was an accomplice rather than a principal to the conversion of a part of the property of the Currie Estate is that the offense was committed at the bank and was complete when the administrator "formed the intent to use the money for his private personal use and did so use it."

As to the $5000 belonging to the estate which, pursuant to the conspiracy, finally was appropriated to the use of the Probate Judge, there is no evidence or suggestion that the administrator at any time had the intent to use any part of this $5000 *for his private personal use, or that he did so use it.*

The contention that the appellant was not a principal in the commission of the offense is quite similar to that we overruled in Parnell v. State, 170 Tex.Cr.R. 30, 339 S.W. 2d 49.

This is not a simple case where thieves break in and steal property that is in the possession of its owner. Here the door was open by reason of the positions of trust occupied by the conspirators and, in violation of such trust and of the statute, property of others entrusted to their care and custody was converted to their own use and benefit.

As in Parnell v. State, supra, the offense was not committed by a single act.

The money belonging to the Currie Estate was under the control of the administrator and was in his possession. He had the power to use or convert it, but no lawful right to do so without an order of the Judge of the Probate Court.

The administrator retained possession of the $5000 that was appropriated to the personal use of the appellant until it was so converted and appropriated as the appellant and the administrator had agreed.

There was evidence to the effect that the money deposited in the Tierra Grande Inc. account was withdrawn under the appellant's directions beginning the next day for his personal use or benefit.

The *intent* that the funds of the estate be converted to their own use was complete when the judge signed an order and the administrator accepted and acted upon it, the agreement being that $5000 of the amount would go to the judge. The check by which the $10,000 was withdrawn from the checking account of the estate and deposited to the personal checking account of the administrator shows on its face that the court's order was its basis. It bore the notation "One-half attorney's fees, one-half expenses of estate as per court order December 19, 1960."

The appellant made the fraudulent order which authorized the withdrawal under the unlawful conspiracy, and it was accepted. He directed the administrator where his $5000 was to be placed. He was present as that term is used in reference to the law of principals when the offense was committed.

Suppose that the administrator had had the $10,000 belonging to the estate in cash in his pocket and, having obtained the order, had left half of it at a hiding place designated by the judge where he later found it!

Could it be said that the judge was not a principal because he was not present at the hiding place when the money was left there for him?

Stripped of the devious means used to cast an air of legitimacy upon the transaction and to conceal their crime and avoid its consequences, the supposed case is in essence the case before us.

Suppose that having drawn the $10,000 check, the administrator had obtained in cash the part which it was agreed would go to the appellant and had carried it to the appellant. Would this Court reverse because the appellant was not with the administrator when the $10,000 check was drawn?

As we said in Parnell v. State, supra:

> "There is no settled mode in which appropriation of money or property of the principal by the officer authorized to receive and handle it must take place. It may occur in numberless ways, and the appropriation consummated in any manner capable of effecting it.
>
> "In many classes of cases the question as to what acts are sufficient to show an appropriation is one of great difficulty.
>
> "So long as the person entrusted with the money or property of another acts in accordance with the terms of his trust in reference thereto he is not guilty of embezzlement. He may deposit the money of his in the bank in his own name without being guilty of appropriating it. But a withdrawal by him for purposes of his own constitutes appropriation, 16 Tex.Jur. 70; or constitutes evidence of conversion. 16 Tex.Jur. 38, 39."

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, is a case where a conviction for theft by false pretext from

one Goolsbee was affirmed, Holt having been present and participated when false representations were made to Goolsbee at Warren, in Tyler County, but was not present when his co-conspirator thereafter extracted $20,000 in money from Goolsbee at Beaumont, in Jefferson County.

This Court declined to follow the view that would narrow the commission of the crime to the very minute the money was delivered and said:

> "We think the correct view is that the time of the crime of theft by false pretext extended from the beginning of the transactions when appellant first visited the Goolsbees until their loot was divided and that the place was in Warren, Tyler County, as well as near the hotel in Beaumont, Jefferson County."

Had the appellant's order been legally proper and genuine, the drawing and cashing of the $10,000 check would not have constituted conversion of property of the estate, or any other offense. It was, however, a fraudulent and unlawful order. Half of the money was to be and was converted to the use of the appellant. There remained the securing of the safety of the conspirators from detection by proper entry in the records of the order of the appellant as probate judge authorizing the pretended attorney's fees without disclosing that the money was to be shared equally with him, and the approval of the administrator's account.

It is true that the probate judge could not commit the offense alone. It is equally true that without the judge's participation the administrator could not have committed it with any degree of hope that he could escape detection and punishment, and would not have shared the money converted with the judge.

The parties acted together as principals, as did the parties in Parnell v. State. If the appellant was not present as that term is used in applying the law of principals, Parnell was not present when the conversion for which he was convicted as a principal occurred.

If the majority is correct in holding that the appellant was an accomplice to the conversion and not a principal, Parnell was not a principal though he was convicted as such and the conviction was affirmed.

For cases where the defendant whose conviction as a principal was affirmed, though he was not at the time in position to have committed the offense himself and was doing nothing at the time the offense was committed by his co-conspirator other than waiting some distance away to carry out his part in the conspiracy, see White v. State, 154 Tex.Cr.R. 489, 228 S.W.2d 165; Gonzales v. State, Tex.Cr. App., 350 S.W.2d 553; Hill v. State, 135 Tex.Cr.R. 567, 121 S.W.2d 996; Stubblefield v. State, Tex. Cr.App., 334 S.W.2d 150.

The holding of the majority that the appellant was not a principal to the conversion will preclude another trial upon the indictment, hence there is no occasion to consider other claims of error.

I respectfully dissent.

ON STATE'S MOTION FOR REHEARING

McDONALD, Judge.

Most of the opinion reversing this cause on original submission was devoted to the distinction between a principal and an accomplice. The majority opinion held that the appellant was not a principal; that the evidence

was insufficient to sustain his conviction as such and viewed from the state's standpoint shows him to have been an accomplice to the crime.

The writer approved the opinion written by Judge Dice on original submission and wrote no opinion thereon. Judge Morrison concurred and Presiding Judge Woodley dissented. I now recede from my original position so far as the appellant being a principal is concerned.

[6] I think that appellant was a principal, rather than an accomplice. I do not agree with Presiding Judge Woodley that Parnell's case, 170 Tex.Cr.R. 30, 339 S.W.2d 49, cited in his dissenting opinion is in point with the case at bar. I say this for the reason that Parnell was present during the course of the conversion. He was present at the Executive Committee Meeting on June 8th, and at the stockholders meeting on August 15th.

I also disclaim Hankamer's case, 142 Tex.Cr.R. 23, 150 S.W.2d 794, cited in our original opinion as authority to support my views therein expressed. Hankamer was an administrator "converting on his own", without any assistance from the county or probate judge. The portion excerpted from his case and cited in the original opinion follows a discussion in his case of the time of various conversions to refute a claim advanced by Hankamer that limitation had run on his offenses, if any. This Court said:

> "He had unquestionably converted the $66.55 to his own use and benefit before he ever made any payment of the premium on the bonds. The conversion was complete the moment he formed the intent to use the money for his private personal use and *did so use it.*"

No other person was present, nor was any action on the part of any other person required for Hankamer to complete the conversion in his case. He was unlike Putney, the co-principal and administrator in this cause. He was acting on his own. Putney was acting with the appellant, or the appellant with him, they were acting together, as I shall hereinafter set forth. The writer has carefully reviewed all of the cases cited by the State and the appellant, along with numerous other cases dealing with the law of principals and accomplices. Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, cited by Presiding Judge Woodley in his dissenting opinion, supports the view that I now entertain. The writer desires to direct attention to Judge Graves' concurring opinion in Holt, supra, in which he cites numerous cases, among them being: Middleton v. State, 86 Tex.Cr.R. 307, 217 S.W. 1046 and Mason v. State, 31 Tex.Cr.R. 306, 20 S.W. 564, which Judge Graves refers to as being "the true doctrine that should be followed" so far as the law of principals is concerned. Judge Simkins wrote the unanimous opinion in Mason's case. I shall not here lengthen this opinion by quoting from either case, but I do feel both cases supports my position. Whether Putney needed the Order from appellant, allowing the $10,000.00 attorney's fee, isn't clear. Appellant did not exercise his statutory duty to conserve and preserve the funds of the estate, he passively sat by and allowed Putney to withdraw the money. The appellant set Putney in motion to perpetrate the offense just as effectively as Middleton did Osment in the murder case, Middleton, supra. It is true that Middleton struck no blow with the hammer, nor did appellant even touch the pen when Putney cashed the check at the bank, and yet, the two cases are parallel.

Cochrain v. State, 93 Tex.Cr.R. 483, 248 S.W. 43, involved an appellant whose part in the transaction was "to pretend to be dead", which he did. In this case Southwestern Life Insurance Company paid out $5,000.00 to Cochrain's wife, based upon a conspiracy that he had died. He, of course, was not present when the money was paid to his wife. He played "dead" and the appellant herein played like Putney was an honest administrator, and he sat back and silently allowed Putney to convert at least $5,000.00 from the Currie estate and place it on deposit for the use of appellant, or in a bank account controlled by appellant. It is quite coincidental that Cochrain's case is even identical to the case at bar as to the sum of money involved, as well as being authority for my position.

[7] The writer feels that we were in error in holding in our original opinion that the trial Court erred in re-refusing to allow appellant, prior to ordering a change of venue of the cause, to adduce evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, Vernon's Ann.St., and of the Fifth and Fourteenth Amendments to the Constitution of the United States, which complained of errors appellant has brought forward by formal Bills of Exception Nos. 9, 10, and 11. Art. 1, Sec. 10, Constitution of Texas protects the rights of an accused in all criminal prosecutions. It does not encompass grand jury action. Rothschild v. State, 7 Tex.App. 519, cited in our original opinion was a case involving an allegation that an unauthorized person was present during the deliberations of the grand jury. The case was reversed be-

cause the trial court refused to permit proof by the appellant on this issue. The record in the instant case discloses that appellant was permitted to make proof herein on his allegation that unauthorized persons were present at the time the grand jury deliberated. The trial court met the requirement of Rothschild, and that case does not support our original view, from which I now retreat. In Juarez v. State, 102 Tex.Cr.R. 297, 277 S.W. 1091, the trial court refused to permit appellant to make proof that he had been purposely discriminated against in the selection of the grand jury which returned the indictments against him. Appellant herein makes no such claim. (The trial court here did refuse to permit appellant to make an inquiry into what evidence the grand jury considered at the time of the return of the indictment.) It has long been the law that the character of testimony or the quantum of proof had before the grand jury cannot be inquired into on a motion to quash the indictment. Article 506, Vernon's Ann.C.C.P., Note 6, citing numerous cases. The foregoing article of our Code of Criminal Procedure does not provide for quashing an indictment against a Negro because it was found by a grand jury from which all persons of the African race had been excluded because of their race or color. Yet such a procedure to quash has been held to be a timely mode of presenting the objection, under the Constitution and laws of the United States, as set forth by appellant's able attorneys. However, I do not think these racial discriminatory cases cited by appellant are in point here.

The case of Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, cited by appellant, is not in point as it is bottomed on the refusal of the trial court

to grant a change of venue. We have no such question before us in the case at bar. The trial court changed the venue of appellant's case. He was tried in Belton, Texas, approximately 200 miles from Houston, Texas, where appellant alleges the complained of publicity took place.

I shall now direct my attention to what I regard as the reversible errors in this case. My views and my position are that the State's Motion for Rehearing should be denied. In this court's original opinion by the majority, Judge Dice, speaking for the court, said, "Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted."

Further elaboration as to these matters was not deemed necessary due to the court's disposition of this cause. I feel, it will be desirable to elaborate and clarify my position through a more labored discussion of the law applicable and direct attention to the errors I regard as reversible.

The indictment returned on June 20, 1962, alleges that the appellant on or about December 19, 1960, did unlawfully, with intent to defraud, convert to his own use $10,000 in money from and belonging to the Estate of Clara L. Currie.

It is undisputed that the state relies for a conviction upon the withdrawal of $10,000 by Putney's check dated December 19, 1960, drawn on and paid out of the Currie Estate as authorized by the appellant, and the unlawful conversion thereof of any sum of money of over fifty dollars. The state adopted this view in briefing this case.

To support the allegations of the indictment the state called the witness, Putney, who testified on direct examination, that he presented an application to appellant, as Probate Judge, for an order approving attorney's fees in the sum of $10,000; that appellant signed the order approving the application but said instruments were left on the desk of the Judge (appellant) and they were never produced at the trial. The bank records reveal that on presentation by Putney of the $10,000 check, he received $500 in money, deposited $9,500 to his personal account, and then drew a $5,000 check on his personal account which he deposited to the account of Tierra Grande, Inc., shown to be controlled by appellant, and that this money was withdrawn for the benefit of appellant.

On cross-examination, by the appellant of Putney, he testified that he had made approximately 50 odd withdrawals of money from the Currie Estate without a court order from the appellant, aggregating in excess of $25,000, *which he had converted to his own use and had shared none of the proceeds with the appellant.*

The state on re-direct examination, over appellant's objection, introduced evidence of another withdrawal by Putney, pursuant to appellant's oral instruction, of $15,000 on January 24, 1961, for the purchase of stock in the Southwest Equities Corporation.

For the admission in evidence of the said $15,000 stock purchase the District Attorney of Harris County argued to the trial Judge that:

> "We think it is in response to the cross-examination with reference to the defendant's knowledge of withdrawals from the estate without a written order. This is such a transaction. My position is that it is admissible to rebut—that all of the withdrawals that were made without an order were made unknown to the defendant".

Thus, it was the theory of the state that it should be allowed to offer evidence in rebuttal, showing that Putney acted in other transactions upon an oral court order by appellant, other than the single order approving the attorney's fee of $10,000. Over timely and proper objection, the evidence was admitted.

In addition to the $15,000 stock purchase, the state proffered the testimony of Putney about a prospectus and the notation appellant had made on it. In the absence of the jury the testimony shows that Putney had seen a prospectus of the Southwest Equities Corporation, and that appellant had written on this prospectus: "Mrs. Currie subcribed for 1,000 shares." After objection had been made, the Court then stated that he would not admit the prospectus, but he would permit the notation "which is ascribed to the defendant, that Mrs. Currie subscribed to

1,000 shares." The Court stated: "The Court understands that the purpose of the State here is to show that the witness had purported oral authority in other transactions other than the one involved". The Harris County District Attorney then stated: "Yes, and that such withdrawals were made to the knowledge of the defendant, without proper order of the Court." Then, in the presence of the jury, the witness, Putney, was asked to identify an exhibit, which *he stated was a prospectus of Southwest Equities Corporation,* that *he had seen it in Judge McClelland's office,* that McClelland instructed him to buy the stock and *that McClelland made the notation on the prospectus: "Mrs. Currie subscribed to 1,000 shares"*; that Putney then withdrew the $15,000.00 from the Currie Estate and invested it in stock of the Southwest Equities Corporation, pursuant to McClelland's oral instructions. The Court then admitted the portion of the prospectus bearing the above-quoted notation.

Following the withdrawal of the $15,000 from the Currie Estate for the purchase of stock on January 24, 1961, proof was made by the State that there were two substantial withdrawals of money totaling over $100,000 from the Currie Estate in connection with two loans made by Putney. One, in the sum of $40,000.00 to Bayou Production Company on March 28, 1961, and the other in the amount of $61,000.00 to C. W. Calhoun, Trustee, on June 16, 1961, both transactions clearly showing no conversion on the part of the appellant, but they gave a strong inference of wrongdoing on his part and no doubt aroused suspicion on the part of the jury, as the District Attorney asked the question: "Does the Probate Code specifically provide for loans to be made from the estates

of decedents?", which, although unanswered, no doubt caused appellant material harm by leaving an inference that the appellant had violated the law under the Probate Code. These were loans to third parties. However, I observe that the state had previously on direct examination, adduced from the witness, Putney, that following the events that he described December 19, 1960, that he subsequently made various withdrawals from the account of Clara L. Currie on many occasions without a court order or without permission of the court and that he approximated to the best of his recollection that these withdrawals amounted to $25,800.00 and some odd cents.

I do not think that the evidence was admissible. The State was actually attempting to bolster or to impeach their own witness. Had they been correctly desirous of introducing this testimony to rebut, then they were rebutting their own witness, which amounts to nothing more than impeaching one's own witness. They did not show surprise nor hostility on the part of the witness, Putney, and I think this evidence was clearly inadmissible. Neither do I think that this testimony was admissible to bolster the state's witness. The state saw fit to adduce upon direct examination testimony which they later regarded as unfavorable to them, and yet they wanted to bolster their own witness with some transactions highly prejudicial to the appellant. The state also was not only getting before the jury evidence which it contended would rebut, but also "that such withdrawals were made to the *knowledge of the defendant,* without proper order of the Court." If I correctly interpret the view of the state, it was their position that the stock purchased from Southwest Equities Corporation and the two loans, all having been made with an order from the Probate Judge (the

appellant), and he having knowledge of such transactions, for he ordered them made, would also refute Putney's testimony that he converted over $25,000.00 to his own use, sharing none of it with appellant. It would in effect charge appellant with knowledge of Putney's misapplications or conversions on 50 odd different occasions. In the face of Putney's testimony about his various independent acts of conversion, I see no similarity in these three transactions, but I do see appellant being greatly prejudiced by this testimony. Here is an estate shown by the record to be worth approximately $160,000.00 in its entirety. Testimony was then admitted showing three transactions, totaling $116,000.00 and the one transaction for $10,000.00 for which appellant was on trial. I think the testimony about these transactions no doubt caused the jury to feel that appellant was probably, along with Putney, out to steal the entire estate and that said testimony was highly prejudicial and inflammatory to appellant's rights to a fair and impartial trial and that it caused the jury to render a verdict for a greater punishment than they would have rendered absent this prejudicial evidence. Viewing the three transactions totaling $116,000.00 in the suspicious light that the jury no doubt saw them, they probably decided that appellant was just a petty thief to only be taking $10,000.00 as charged; so the additional evidence of the one hundred thousand dollars plus transactions removed any doubt from their minds as to appellant's guilt. The jury probably computed that here was a Probate Judge, with his co-principal, who stole $126,000.00 in four transactions, or about three-fourths of the entire estate of $160,000.00.

Assuming for the sake of argument that the evidence of these three transactions was admissible to prove either

intent, system or identity, or in developing the res gestae, so as to bring it within one of the exceptions to the general rule of admissibility as to extraneous offenses or transactions, the trial court imposed no limitations upon his instructions to the jury as to these tranasactions, over appellant's timely objections. For this error alone the cause should be reversed.

For the reasons stated, the State's Motion for Rehearing is overruled.

*MORRISON, Judge (concurring).

Remaining convinced of the soundness of the original opinion holding the appellant to be an accomplice rather than a principal and my concurrence therewith, I would add only the following.

While I agree with the result, I cannot bring myself to agree with the assumption not supported by evidence that appellant's proof as to the unconstitutionality of the grand jury's action must necessarily have come from what occurred within the grand jury room and not from the holding of the highly publicized court of inquiry. We, as a Court, have no authority to make such an assumption against an accused, or to speculate as to the nature or quality of the proof which might have been adduced had the court permitted it. I further take issue with my brother McDonald in his statement that the constitutional guarantees do not encompass grand jury action.

I viewed Judge DICE's discussion of the proof of extraneous offenses as grounds for reversal as will be seen from my original concurrence herein. I concur in the overruling of the State's motion for rehearing.

WOODLEY, Presiding Judge (dissenting).

It is regrettable that the views of the Judges of this Court as to the controlling principles of law and their application are so divergent that the numerous and lengthy opinions herein will be of little value as legal precedent or as authority in any case other than that before the Court.

The majority opinion on original submission reversed this conviction upon the holding that the evidence showed appellant's guilt as an accomplice, but not as a principal.

[6] Judge McDONALD's opinion on rehearing states his present view that such holding was wrong and that the evidence is sufficient to sustain the conviction of the appellant as a principal. Thus, the conclusion that the evidence is sufficient to sustain appellant's conviction as a principal becomes the majority holding.

[7] The writer concurs in the conclusion of Judge McDONALD that the court in Harris County did not err in refusing to hear testimony regarding what evidence the grand jury considered in returning the indictment against the appellant.

This holding of the majority leaves only the supposed errors on the trial in Bell County which were not relied upon in Judge DICE's opinion as ground for reversal, but were the basis of the admonition to the trial court not to admit certain evidence and to limit certain evidence "upon another trial."

On original submission there was no occasion for the Court to consider these claims of error because another trial upon the indictment had been precluded by the holding that the appellant was not a principal, as the indictment charged.

The evidence which Judge McDONALD holds inadmissible as showing extraneous offenses relates to property belonging to the Currie Estate and the actions of the appellant as County Judge, and of the administrator Putney in regard thereto. This evidence was admissible. If it showed or tended to show any offense it was not an extraneous offense but the offense charged in the indictment, namely the conversion of property belonging to the Currie Estate by the administrator, the appellant acting with him as a principal.

It is not controlling that the state elected to stand upon the conversion of $50 or more of the proceeds of the $10,000 check. The allegations of the indictment, not the case submitted to the jury, determines what evidence is admissible and what is extraneous.

It is incorrect to assume that the state was limited by the indictment to the proceeds of the $10,000 check drawn on the account of the Currie Estate. The court properly charged the jury that proof of conversion of $50 or more belonging to the estate would be sufficient. In the jury's absence the trial judge stated, in ruling upon an objection: "Gentlemen, the indictment alleges the theft of $10,000 from the estate. It does not say what $10,000 was taken from the estate."

The first reference to the Southwest Equities Corporation transaction was when Putney testified on cross-examination that he had been indicted "on the $15,000 Southwest Equities check." Thereafter the state offered the prospectus and proof regarding the appellant's connection with Southwest Equities Corporation, but the careful trial judge ruling in the absence of the jury admitted only the notation

ascribed to the appellant, the check and the testimony of Putney that the appellant told him to issue it but no court order was obtained.

The first reference to a loan made from the Currie Estate was also on Putney's cross-examination regarding a transfer of funds belonging to the estate from a Savings and Loan Association to a checking account when Putney testified: "That was at the time that we were making the loan for the estate."

Also the final account of Putney was introduced as State's Exhibit S-26 wherein the loans and Southwest Equities Corporation $15,000 investment are listed. Also Putney testified on cross-examination about the loans and interest thereon.

The complained of testimony went no further than to show that loans were authorized and made for the Currie Estate.

In view of the above, appellant has no ground to complain.

Much has been written about Putney's testimony elicited by the defense as to withdrawals he made and converted to his own use which the appellant did not authorize and about which he was not advised.

To make this part of the evidence complete attention is directed to Putney's explanation made and repeated that he drew the money in violation of the law, knowingly, in anticipation of fees and made false statements on the checks "simply to assure myself that I would not have to split any more fees * * * I did not intend to divide any more fees."

Also, the record shows that evidence was elicited by the defense showing that Putney, with the knowledge of the appellant, sold $40,278.24 worth of Texaco Inc. stock belonging to the Currie Estate a month before he obtained a court order to do so. And on his cross-examination Putney testified that he sold U. S. Treasury Bonds belonging to the Currie Estate with the knowledge of the appellant but without obtaining a court order.

I see no error in the failure of the court to limit the evidence mentioned in his charge.

I respectfully dissent from the overruling of the State's motion for rehearing.

APPENDIX "C"

SENTENCE

IN THE DISTRICT COURT
of Falls County, Texas
May Term, 1964, August 3, 1964

NO. 3958

THE STATE OF TEXAS
v.
CLEM McCLELLAND

THIS DAY This cause being again called, the State appeared by her County Attorney, and the Defendant Clem McClelland was brought into open court, in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term, and thereupon the Defendant Clem McClelland, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant Clem McClelland, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT That the Defendant Clem McClelland, who has been adjudged to be guilty of Accepting a Bribe and whose punishment has been prescribed at confinement in the penitentiary for a term of 5 years, and a $5000.00 fine be delivered by the

Sheriff of Falls County, Texas, immediately to the Superintendent of Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and the said Clem McClelland shall be confined in said penitentiaries for a term of not less than two nor more than five years, in accordance with the provisions of the law governing the penitentiaries of said State, and the said Clem McClelland is remanded to jail until said Sheriff can obey the directions of this sentence.

It is further ordered, adjudged and decreed by the Court that the State of Texas do have and recover of the defendant, Clem McClelland the said fine of $5000.00 and all costs of this prosecution of said defendant. And execution may issue against the property of said defendant for the amount of such fine and costs.

A TRUE COPY
Attest:
GLENN HAYNES,
Glenn Haynes, Clerk,
Court of Criminal Appeals of Texas

THOMAS F. LOWE, Deputy

"APPENDIX "D"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

I THOMAS F. LOWE, DEPUTY Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,833 styled:

CLEM McCLELLAND, Appellant

v.

THE STATE OF TEXAS, Appellee

judgment of the 82nd Judicial District Court of Falls County, was affirmed on March 10, 1965, Appellant's Motion for Rehearing overruled May 5, 1965, Appellant's 2nd Motion for Rehearing overruled without written opinion, on June 9, 1965, and mandate issued June 11, 1965.

THEREFORE, with the overruling of Appellant's 2nd Motion for Rehearing, this cause was disposed of by this Court on June 9, 1965, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the Court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this Court.

On July 15, 1965, a majority of the Court of Criminal Appeals of Texas, ordered the transmittal of the original exhibits to the Supreme Court of the United States.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas this 26th day of July, A.D. 1965.

THOMAS F. LOWE
Thomas F. Lowe, Deputy Clerk
Court of Criminal Appeals of Texas

APPENDIX "E"

IN THE CRIMINAL DISTRICT COURT NO. 5
HARRIS COUNTY, TEXAS

NO. 105,271

THE STATE OF TEXAS
v.
CLEM McCLELLAND

DEFENDANT CLEM McCLELLAND'S
MOTION TO QUASH INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Clem McClelland, and files this, his Motion to Quash the Indictment brought against him in this cause, showing as grounds therefor the following:

1.

Prior to the bringing of the indictment in this cause, and over the objection of the Defendant, The State of Texas, acting through the District Attorney of Harris County, Texas, the Honorable Frank Briscoe, and on the petition, initiation, and instigation of the District Attorney, conducted a so-called "Court of Inquiry" concerning the matters alleged against this Defendant in the indictment. The so-called "Court of Inquiry" was held in public and began on the 14th day of June, 1962, before the Honorable W. C. Ragan, Justice of the Peace of the Justice Court of Harris County, Texas, Precinct One. The so-called "Court of Inquiry" continued throughout the day of June 14th, throughout the day of June 15th, until the hour of

Noon on June 16th, and until the hour of Noon on June 18th. The so-called "Court of Inquiry" being held in public, the witnesses for the State were examined in public by the Honorable Frank Briscoe, District Attorney of Harris County, Texas, and his assistants.

Notwithstanding that the "Court of Inquiry" was inquiring into alleged offenses against the laws of the State of Texas in the processing of various estates by the Probate Court of Harris County, Texas, of which Court the Defendant was Judge, and notwithstanding that the Defendant was subpoenaed and ordered under protest to testify, as a "witness" in said "Court of Inquiry" during the so-called "Court of Inquiry" Defendant was denied the right to know in advance of the "Court of Inquiry", the nature and cause of the accusations to be inquired into, was denied the right of confrontation of the witnesses testifying in the "Court of Inquiry", was denied the right to cross-examine and contradict the witnesses testifying in the "Court of Inquiry", was denied the right to have compulsory process for obtaining witnesses in his favor, was denied the right to rebut the testimony brought by the State, was denied the right to show that no offenses had occurred, and was denied the right to be represented by Counsel and to consult with counsel during the proceedings in the "Court of Inquiry".

Long prior to the convening of the "Court of Inquiry", a grand jury of Harris County, Texas, had been duly impanelled and convened on the 7th day of May, 1962, by the Honorable Sam W. Davis, Judge of the Criminal District Court No. 5 of Harris County, Texas. This Grand Jury was functioning at the time the District Attorney petitioned for the "Court of Inquiry", at the time the

"Court of Inquiry" was ordered by Honorable W. C. Ragan, and at all the times that the "Court of Inquiry" was in public session.

Prior to the convening of the "Court of Inquiry" the District Attorney had taken before the said Grand Jury two or more witnesses concerning the investigation of the Probate Court of Harris County, Texas, but no indictment was returned by that Grand Jury prior to the "Court of Inquiry".

As a result of the public examination of the State's witnesses in the "Court of Inquiry", the proceedings in the "Court of Inquiry" and extensive amounts of the testimony in the "Court of Inquiry" were by newspapers, radio and television published throughout Harris County and large sections of the State of Texas. In addition, the "Court of Inquiry", being public, many members of the public were in attendance at the "Court of Inquiry", and heard the public examination of the State's witnesses.

The conduct of the "Court of Inquiry" and the public examination of the State's witnesses vitiates this indictment because under the Constitution of The State of Texas and the Laws of The State of Texas, and the Constitution of the United States, this Defendant was and is entitled to be charged by indictment brought only by proper and lawful proceedings of a Grand Jury. Proper and lawful proceedings of a Grand Jury in due course of law of the land and in due process of law require that the examination of the State's witnesses be in the secrecy of the Grand Jury proceedings until formal accusation by indictment is brought according to law. The State's witnesses having been publicly examined in the "Court of Inquiry" and not

in the secrecy of Grand Jury proceedings this indictment has not been brought by a Grand Jury according to the course of the law of the land and has not been brought according to due process of law.

The public examination of the State's witnesses in the "Court of Inquiry" under the circumstances and conditions existing and the State's witnesses not being examined in secret proceedings of the Grand Jury this Defendant has been denied the right to answer for a criminal offense of the grade of felony only on the indictment of a Grand Jury, in violation of the prohibitions of Art. 1, Sec. 10 of the *Constitution of The State of Texas*, and of Amendment V of the *Constitution of the United States.*

II.

The mode and manner in which the "Court of Inquiry" was held, all as alleged above, denied to this Defendant his rights, privileges and immunities guaranteed to him by the *Constitution of The State of Texas,* and by the *Constitution of the United States.* Without waiving this general allegation of the denial of his constitutional rights and privileges, but still insisting on same, and pleading expressly in the alternative, this Defendant shows that the so-called "Court of Inquiry", as conducted and as described above, denied to this Defendant the following constitutional rights, privileges and immunities, and violated the following prohibitions of the *Constitution of The State of Texas* and of the *Constitution of the United States:*

(1). It denied to this Defendant equal rights as guaranteed to him by Article I, Section 3, of the *Constitution of The State of Texas.*

(2). It denied to him the equal protection of the law as guaranteed to him by Amendment XIV of the *Constitution of the United States.*

(3). It denied to him the right to demand the nature and cause of the accusation against him, and to have a copy thereof as guaranteed to him by Article I, Section 10, of the *Constitution of The State of Texas,* and by Amendment VI of the *Constitution of the United States.*

(4). It denied to him the right to be confronted by the witnesses against him as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(5). It denied to him the right to be represented by counsel and to have the assistance of counsel during the proceedings in "Court of Inquiry" as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(6). It denied to him the right to have compulsory process for obtaining witnesses in his favor as guaranteed by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(7). It denied to him the privileges and/or immunities of a Citizen of the State of Texas as guaranteed to him by Article I, Section 19, of the *Constitution of the State of Texas* and abridged his privileges and/or immunities as a Citizen of the

United States as guaranteed by Amendment XIV of the *Constitution of the United States.*

(8). It denied to him the due course of the law of the land as guaranteed him by Article I, Section 19, of the *Constitution of the State of Texas* and due process of law as guaranteed to him by Amendment V and XIV of the *Constitution of the United States.*

(9). It denied to him the right, immunity and privilege of answering to a criminal offense of the grade of felony only on the indictment of a Grand Jury in that the traditional Grand Jury procedures of having the State's witnesses examined in the secrecy of Grand Jury proceedings were violated, with the resulting violation of the provisions of Article I, Section 10, of the *Constitution of the State of Texas* and Amendment V of *the Constitution of the United States.*

(10). It inflicted upon this Defendant, prior to formal accusation by indictment of a Grand Jury, cruel and unusual punishment as prohibited by Article I, Section 13, of the *Constitution of the State of Texas* and Amendment VIII of the Constitution of the United States.

The violation of the foregoing privileges, rights and immunities, and the [redacted] this Defendant vitiates and voids the indictment, and estops the State to assert the indictment against this Defendant, and estops the State to prosecute this Defendant, on the indictment. In this connection this Defendant shows that the denial

of his constitutional rights, privileges, and immunities was brought about by the purposeful, willful and intentional acts and decisions of The State of Texas acting by and through its duly qualified and acting agent and District Attorney of Harris County, Texas, the Honorable Frank Briscoe.

Further in this connection this defendant shows that in petitioning for, instigating, and conducting the "Court of Inquiry" as described above the Honorable Frank Briscoe, District Attorney of Harris County, Texas, acted under color of State authority and/or under color of State law. He purposefully, intentionally, and wilfully, under color of State authority and under color of State law, instigated, promoted and conducted procedures that denied to this Defendant fundamental rights and constitutional rights guaranteed to this Defendant by the *Constitution of the State of Texas* and the *Constitution of the United States.* The violation of these rights, individually and cumulatively, vitiates and voids the indictment.

III.

Defendant believes and has cause to believe that during the "Court of Inquiry" one or more members of the Grand Jury that voted for the indictment attended the proceedings in the "Court of Inquiry." He shows further that one or more members of the Grand Jury that voted for the indictment either by newspapers, by radio, by television, or by other methods, were informed of the proceedings in the "Court of Inquiry" and of testimony and evidence produced before the "Court of Inquiry." Defendant shows that the "Court of Inquiry" constituted undue influence and coercion on the personnel of the Grand

Jury prior to the bringing of the indictment. He shows that the Grand Jury prior to the bringing of the indictment, and at the time of bringing of the indictment, was subjected to the undue influences and coercion produced by the "Court of Inquiry", and was subjected to various and other undue and unlawful influences.

IV.

There was extensive publicity by all of the news media of the county, beginning on or about the 1st day of June, 1962, concerning the affairs of the Probate Court of Harris County, Texas, and related to the Defendant herein, which publicity was substantially incited, stimulated and aggravated by the District Attorney of Harris County, Texas, and by his assistants, and by other State and County officials of Harris County, Texas. Such publicity was precipitated, incited, stimulated and aggravated by the District Attorney and his assistants in examining the State's witnesses in public in a so-called "Court of Inquiry". The publicity resulting, and particularly that publicity resulting from the acts and conduct of the District Attorney and his assistants in conducting the so-called "Court of Inquiry" and in examining the State's witnesses in public prior to indictment, affected, influenced and infected the deliberations of the Grand Jury.

V.

Defendant shows that the so-called "Court of Inquiry" was, by the District Attorney and the Grand Jury, made a part of the Grand Jury proceedings and deliberations in a three-step proceeding as follows:

(1) Before the convening of the "Court of Inquiry", the District Attorney and the then existing Grand Jury brought before that Grand Jury witnesses concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant.

(2) Then the legal, proper, usual and customary deliberations of that Grand Jury concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant were adjourned, interrupted, postponed and delayed until a so-called "Court of Inquiry" could be conducted with the State's witnesses being examined in public. One or more of the grand jurors bringing this indictment attended the "Court of Inquiry" or were informed of its proceedings and the testimony before it by all of the modern news media and by other means.

(3) Next, the "Court of Inquiry" was recessed and the Grand Jury bringing this indictment was ultimately impanelled and took under consideration the investigation of the affairs of the Probate Court of Harris County and of this defendant, and returned this indictment against this defendant without the testimony of witnesses other than the testimony produced by transcripts of the "Court of Inquiry" proceedings.

These procedures constituted unlawful and unconstitutional Grand Jury procedures in violation of the laws and *Constitution of the State of Texas* and of the *Constitution of the United States.*

VI.

Defendant shows that for many decades in all types of felony accusations the District Attorneys office of Harris

County, Texas, has used the usual, proper, customary and traditional grand jury procedures wherein the examination of the State's witnesses was in the traditional secrecy of grand jury sessions. To the best of defendant's knowledge and belief the three-step procedure used by the District Attorney's office in the bringing of the present indictment has never before been used in Harris County, Texas, or in the State of Texas. Defendant shows that such procedures deprive him of due process of law and the due course of the law of the land under the laws and *Constitutions of the State of Texas and of the United States,* and deprive him of the equal protection of the laws, in violation of the provisions of the laws and *Constitutions of the State of Texas and of the United States.*

VII.

Because of the three-step procedures as described in Paragraph V, *supra,* the indictment brought in this cause is not an indictment by Grand Jury, for the usages, customs and traditions of Texas Jurisprudence, Federal Jurisprudence and English Jurisprudence are that the State's witnesses shall be examined in secrecy in grand jury proceedings and not publicly examined as was done by the District Attorney, a state official, in this cause. For such reason the indictment should be quashed and this cause dismissed. The constitutional guaranty of the State of Texas, Article I, Section 10, guarantees to this Defendant that he shall not be held to answer for a criminal offense of the grade of felony "unless on an indictment of a grand jury". As previously stated, this indictment is not the indictment of a Grand Jury according to the traditions, customs and usages of grand jury procedures. In this

connection the Defendant again shows and urges that public examination of the State's witnesses and the use of the three-step procedures described in Paragraph V, *supra*, was deliberately instigated by the District Attorney and was an abuse by him of the laws of the State of Texas.

VIII.

Defendant further shows that the indictment should be quashed for the reason that the District Attorney purposely and intentionally instigated the "Court of Inquiry" and the public examination of the State's witnesses in the "Court of Inquiry" without the Defendant having the right of cross-examination, rebuttal, contradiction, calling witnesses in his own behalf and the representation of counsel in the "Court of Inquiry", all with the purpose and intent of prejudicing the public of Harris County, Texas, and the potential jurors of Harris County, Texas, against the Defendant, and with the additional purpose and intent of creating conditions in Harris County, Texas, and a climate of public opinion in Harris County, Texas, prejudicial to the Defendant which would make it impossible for the Defendant to have and obtain a fair and impartial trial and a fair and impartial jury in Harris County, Texas, which is the county where Defendant resides, and the county where the offense is alleged to have occurred. Such acts and conduct on the part of the District Attorney deprives the Defendant of due process of law, the due course of the law of the land, and the equal protection of the laws.

In this connection Defendant shows that under the due course of the law of the land he was entitled to be tried for the alleged offense in Harris County, Texas, the

county of his residence and the county where the alleged offense is alleged to have occurred. He was further entitled, under the law of the land, to have a fair and impartial trial and a fair and impartial jury in said County of Harris. The purposeful and intentional acts on the part of the District Attorney have deprived Defendant of such rights.

IX.

As further grounds for quashing this indictment, the Defendant shows that in the "Court of Inquiry" the District Attorney and his assistants purposely and intentionally introduced testimony in the nature of gossip, hearsay and other types of testimony which would not be in any way admissible against the Defendant in a Court of Law. Question and Answer reports of such inadmissible testimony, gossip and hearsay were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. In addition Defendant shows that much of the evidence introduced in the "Court of Inquiry" that was prejudicjal to Defendant related to alleged criminal derelictions and alleged official misconduct outside the charges of the present indictment. Question and Answer reports of such inadmissible testimony were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. Thus the prospective jurors of Harris County, Texas, have had presented to them evidence that would be inadmissible on a trial of this cause. This was purposely precipitated and brought about by the District Attorney and was an abuse of the laws of the State of Texas, and was a violation of the *Laws and Constitution of the State of Texas* and of the *Constitution of the United States*. For these further reasons the indictment should be quashed.

X.

Defendant further shows that the violation of due process of law, the due course of the law of the land and of the constitutional privileges and immunities, including the equal protection of the laws, all as guaranteed to him by the *Constitution of the State of Texas* and by the *Constitution of the United States*, whether such violations are considered singly or cumulatively, have been so great and so numerous that their prejudicial effect can not be removed. For such further reasons the indictment should be quashed.

XI.

The indictment is fatally defective in that it fails to allege sufficient elements of the offenses of "bribery" in that it fails to allege what duty as a Probate Judge the defendant, Clem McClelland, violated in his judicial capacity and thereby wholly fails to advise this defendant, Clem McClelland of the charge against him.

XII.

The indictment is fatally defective in that it is duplicitous in that it charges more than one offense under the laws of the State of Texas. It alleges that the defendant accepted a bribe from: (1) Ross Evahn, (2) David Hudson, (3) E. R. Coffey (4) R. M. Duren and (5) James Bryson Martin, all of which are separate offenses under the laws of the State of Texas.

The indictment further alleges that the alleged bribe was under an agreement and with the understanding that the defendant's (1) Acts, (2) Decisions, (3) judgments and (4) Recommendations would be influenced by the alleged

bribe. Any one act, any one decision, any one judgment, any one recommendation would be a separate offense under the laws of the State of Texas.

The indictment alleges that the agreement and understanding was that the defendant would appoint: Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren and James Bryson Martin as (1) Appraisers, (2) Administrators and (3) Guardians in: (1) Matters (2) Causes and (3) Proceedings, which would thereafter be brought before the said Clem McClelland. Any one appointment of any one of the said persons in any one of such capacities in any one matter, or in any one proceeding, or in any one cause would be a separate offense under the laws of the State of Texas. For all of the above reasons, the indictment should be quashed because of its being duplicitous.

XIII.

The indictment is so vague and uncertain as to fail to apprise this defendant of the charge against him in that it does not state whether the alleged $25,783.10 in money was paid to the defendant, Clem McClelland, by Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, James Bryson Martin, jointly, or that each of them paid him a sum of money in the amount of $25,783.10.

XIV.

The indictment is so vague and uncertain as to fail to advise the defendant of the charge against him in that it fails to specify whether defendant is charged with appointing the said Ross Evahn, David Hudson, E. R. Coffey, R. M. Duren, and James Bryson Martin as appraisers, administrators, or guardians, jointly or individually.

XV.

The indictment is so vague and uncertain as to fail to advise the defendant of the charge against him in that it fails to allege by any number, styled, or other designation or identifying description to apprise defendant:

(1) in what cause or causes defendant agreed to or understood that he would appoint Ross Evahn as (a) an appraiser (b) As Administrator (c) as a Guardian.

(2) In what cause or causes defendant agreed to or understood that he would appoint David Hudson as (a) an Appraiser (b) as Administrator (c) as a Guardian.

(3) In what cause or causes defendant agreed to or understood that he would appoint E. R. Coffey as (a) an Appraiser (b) as Administrator (c) as a Guardian.

(4) In what cause or causes defendant agreed to or understood that he would appoint R. M. Duren as (a) an Appraiser (b) as Administrator (c) as a Guardian.

(5) In what cause or causes defendant agreed to or understood that he would appoint James Bryson Martin as (a) an Appraiser (b) an Adminstrator (c) as a Guardian.

In no way does the indictment allege what was or is the violation of Clem McClelland's duty as Judge of the Probate Court of Harris County, Texas.

XVI.

The indictment is totally defective in that it fails to state the elements of the offense of bribery as required by *Texas Penal Code Article 159.* Though the indictment alleges an agreement and understanding to make general

appointments as appraisers, administrators, and guardians, generally in various matters, causes, and proceedings, then pending and thereafter to be brought before the defendant, such allegations do not meet the requirements of the statute. The applicable provisions of the statute expressly refers to "any *particular* nomination or appointment." Nowhere in the indictment is any *particular* nomination or appointment of any *particular* individual in any *particular* matter, cause or proceeding specified or alleged.

For the same reasons the indictment is so vague and uncertain as to fail to advise the defendant of the charge against him.

XVII.

The Statute under which the indictment is brought, *Texas Penal Code Articles 158 and 159* is so vague and uncertain as to not support a conviction of a criminal offense under the laws of the State of Texas. In this connection, defendant shows that *Texas Penal Code Article 159* sets forth the offense and by reference makes the punishment for the offense to be the punishment under *Texas Penal Code, Article 158,* are described as follows:

". . . And shall be confined in the penitentiary not less than two nor more than five years, or be confined in jail for not less than one month nor more than two years, or be fined not less than $500.00 nor more than $5,000.00 *or by both such fine and imprisonment.*"

The punishment provisions of the statute are so indefinitely framed, are of such doubtful construction that it can not be understood either from the language in which it is expressed, or from some other written law of the State;

consequently, such provision of the statute is wholly inoperative under provisions of *Texas Penal Code, Article 6*. Further, the language being so vague and indefinite, there is no understandable penalty affixed by the written law of the State, and so the penalty is unauthorized and conviction and punishment under the statute is unauthorized by virtue of the provisions of Texas Penal Code, *Article 3*.

XVIII.

Because of all the allegations contained in Paragraphs XI to XVII, *supra* the indictment is so vague and uncertain that the defendant can not know with what he is charged so as to be able to prepare his defense. Such general allegations of criminal charges deny to the defendant due process of law and due course of law under the Constitutions of the United States and of the State of Texas.

XIX.

The indictment is vague and uncertain and wholly fails to apprise the defendant of the charges against him in that it fails to specify whether:

(1) Defendant was supposed to appoint Ross Evahn only as an appraiser, or only as an administrator, or only as a Guardian or both appraiser and administrator, or both appraiser and guardian, or both administrator and guardian, or appraiser, guardian and administrator, in the causes pending before the defendant, Clem McClelland.

(2) Defendant was supposed to appoint David Hudson only as an appraiser, or only as an administrator, or only as a Guardian or both appraiser and

administrator, or both appraiser and guardian, or both administrator and guardian, or appraiser, guardian and administrator, in the causes pending before the defendant Clem McClelland.

(3) Defendant was supposed to appoint E. R. Coffey only as an appraiser or only as an administrator or only as a Guardian or both appraiser and administrator, or both appraiser and guardian, or both administrator and guardian, or appraiser, guardian and administrator, in the causes pending before the defendant, Clem McClelland.

(4) Defendant was supposed to appoint R. M. Duren only as an appraiser, or only as an administrator, or only as a Guardian or both appraiser and administrator, or both appraiser and guardian, or both administrator and guardian, or appraiser, guardian and administrator, in the causes pending before the defendant, Clem McClelland.

(5) Defendant was supposed to appoint James Bryson Martin only as an appraiser, or only as an administrator, or only as a Guardian or both appraiser and administrator, or both appraiser and guardian, or both administrator and guardian, or appraiser, guardian and administrator, in the causes pending before the defendant, Clem McClelland.

For such reason the indictment should be quashed.

XX.

The indictment is vague and uncertain and wholly fails to appraise the defendant of the charge against him in that it fails to specify:

(1) What part of the $25,783.10, if any the defendant accepted: (1) from Ross Evahn, (2) from David Hudson, (3) from E. R. Coffey, (4) from R. M. Duren, (5) from James Bryson Martin.

For such further reason, the indictment should be quashed.

WHEREFORE, premises considered, Defendant prays that the indictment be quashed, set aside and vacated and that Defendant be discharged.

Respectfully submitted,

/s/ J. Edwin Smith
J. EDWIN SMITH

/s/ Jack J. Rawitscher
JACK J. RAWITSCHER

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505 Scanlan Building
Houston 2, Texas
Telephone: CApitol 3-4444

OF COUNSEL

Attorneys for Defendant,
Clem McClelland

THE STATE OF TEXAS
COUNTY OF HARRIS

I, the undersigned Clem McClelland, Defendant in the above styled and numbered cause, on oath state that the matters of fact recited in the foregoing Motion are true and correct.

WITNESS my hand at Houston, Harris County, Texas, this 11th day of November, 1963.

/s/ Clem McClelland
Clem McClelland

SUBSCRIBED and sworn to before me, the undersigned authority, on this the 11th day of November, A.D. 1963.

/s/ Irene Boswell
Notary Public in and for
Harris County, Texas
Irene Boswell

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant, Clem McClelland, certify that a true copy of this Motion was delivered to the Office of the Honorable Frank Briscoe, District Attorney of Harris County, Texas, on the 8th day of November, 1963.

/s/ J. Edwin Smith

Nov 13-1963-

Defendant's Motion to quash the indictment is overuled

Sam W. Davis
Judge
C D. 5.